COURTS ON TRIAL SYMPOSIUM CLOSING REMARKS

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The Institute for Law and Economic Policy ("ILEP") was formed a little over two years ago, and as I said at our last conference, it is still not a household word, not even in my household. It was formed in the wake of the adoption of the Private Securities Litigation Reform Act ("PSLRA"). Every time I say "reform" in the context of that statute, I choke a little. The adoption of the PSLRA demonstrated much of what is wrong with the legislative process, including the effect of powerful, well financed lobbies able to feed a campaign in which, by sheer repetition, misinformation becomes accepted dogma.

The best illustration of this was the caricature that Senator Kyl presented here yesterday. The caricature was of the typical securities class action practice. Every time a stock dropped by ten percent, plaintiffs' lawyers pushed a few buttons and boiler plate complaints came out. Within some short period of time, because the defendants could not afford to spend six million dollars on defense costs—that was the number Senator Kyl used—the defendants would settle the case for five to ten million dollars, irrespective of the merits, and plaintiffs' counsel would receive a fee of somewhere between one-third and fifty percent of the recovery. Again, those were the percentages he used.

Virtually none of that was accurate, and all Senator Kyl had to do was read Joel Seligman's article in the *Harvard Law Review* entitled *The Merits Do Matter*,[1] if accuracy was his objective. The PSLRA was an attack on one aspect of our civil justice system. It was meant to cripple a body of law developed by the courts over a fifty year period that effectively protected the rights of investors and had the incidental but important effect of deterring corporate misconduct. That body of law played an important role in protecting the integrity of securities

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1. Joel Seligman, *The Merits Do Matter*, 108 HARV. L. REV. 438 (1994).

markets in the United States—the most liquid, the deepest, the most honest markets in the world.

As one plaintiffs' lawyer noted yesterday, we cannot rewrite that statute. We have to live with it, and it will have its consequences. But as a result of its adoption, some of us are committed to adding a voice to the national dialogue to give a deeper understanding of the role of the civil justice system, its attributes as well as its weaknesses.

The civil justice system is a fundamental part of the bedrock of our pluralistic, socially mobile, democratic society. In this country, courts have a role, unique in the civilized world. Courts have resolved great social and political issues, issues that would in other countries be decided by legislators or by the executive branch. All I need do is mention four cases that were decided since I entered law school. The first is *Brown v. Board of Education*.[2] The second is *Baker v. Carr*,[3] the one-person, one-vote case. The third is *Griswold v. Connecticut*,[4] establishing that each of us has a zone of privacy into which the state cannot enter. And the final one is *Roe v. Wade*.[5] You all know that case. Other types of issues cannot be illustrated by a single case but are resolved by a mosaic of cases the result of which is the enhancement and quality of our life and our society.

In our country, newspapers and legislators will decry brutality in a Turkish or Mexican prison, but only an American judge will ameliorate brutal conditions in an American prison. I was not born yesterday; I know that ninety-eight percent of those prisoner petitions are frivolous, but it is how we treat the other two percent that determines how decent a society we are. I recall a decision by Judge Lasker in New York in which he dealt with New York prisons[6] where inmates awaiting trial often spent sixteen hours a day double-bunked in eight-foot cells with little access to reading material, telephones, or visitors. Quoting from an item in *USA Today*, Arthur Miller yesterday referred to a Montana class action case in which prisoners were awarded a money judgment probably because of terrible conditions there. However, those are not the issues that legislators get points for—they do not talk about those. They just say, "send more people to prison," and the more brutal the prisons are, the happier they seem to be.

Next is tobacco.[7] Issues relating to the conduct of tobacco marketing are going to be resolved one way or another. Not because fifteen Attorneys General brought a lawsuit. Not because the Senate is acting now. Not even because the FDA acted a year or two ago. The tobacco industry will be held accountable because over a period of forty years, hundreds of cases were brought, most of them

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2. 347 U.S. 483 (1954).
3. 369 U.S. 186 (1962).
4. 381 U.S. 479 (1965).
5. 410 U.S. 113 (1973).
6. *See* Benjamin v. Malcolm, 495 F. Supp. 1357 (S.D.N.Y. 1980).
7. My firm is representing plaintiffs in cases in New York in which class certification has been sought. The cases have been dismissed by the intermediate appellate court (the Appellate Division), and plaintiffs will be seeking review by the Court of Appeals.

by lawyers on a contingent fee basis, and most of them were lost.

Then there is Rule 10b-5.[8] My friend Mel Goldman, whom I deeply respect, yesterday said that there is no basis or authority for Rule 10b-5 civil liability. He is probably right. The civil remedy for violating Rule 10b-5 was created by a federal district judge in the Eastern District of Pennsylvania in 1947 in a case called *Kardon v. National Gypsum Co.*,[9] in which the court held that this little known rule under a criminal statute created civil liability. A great body of law was built on that ruling in the greatest tradition of our common law. Implied civil liability under Rule 10b-5 could have been stopped by a stroke of the SEC, by the courts or by the Congress. But it was not. The development of that body of law filled a need—a flexible, organic body of law that could address serious issues in a society whose exploding national markets needed some element of control besides the SEC. The SEC itself recognized that need in its *amicus* brief in the *Borak*[10] case and in testimony by its staff prior to the adoption of the PSLRA.

The need for that body of law is obvious to most students of our securities markets. Indeed, that is the reason that the PSLRA itself could not repeal the whole body of law. I do not think the senators and congressmen who adopted PSLRA would have the nerve to even try to do that in light of what it has accomplished in enhancing and buttressing national securities markets.

The underpinning for all of this—the great cases like *Brown v. Board of Education*[11] and *Baker v. Carr*[12] and the mosaic in the tobacco litigation and in Rule 10b-5—is access to the courts. Access to American courts is available for two reasons: the contingent fee and the American rule. This system has been attacked again and again. Jerold Auerbach wrote a marvelous book that came out about 20 years ago.[13] There, he talked about how the American Bar Association attacked contingent fee lawyers in the 1920s.

When I was on vacation in London, I clipped an article from the *Times of London* entitled *Justice for the Middle Class in Law Reform.*[14] The new Labour government proposed two things that would give access to British courts by the middle class, people who were earning 25,000 to 50,000 pounds a year, or approximately $35,000 to $70,000 in U.S. dollars. What was the proposal? Contingent fees and a system whereby a plaintiff, in the event of loss, could be compensated by a system of insurance for the opposition's legal fees. Because nobody writes on a clean slate, Parliament could not repeal the "loser pays" rule, but the government recognized that this rule denies Britain's middle class of access to the courts and that denial of access is denial of justice. It is unfortunate that in

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8. 17 C.F.R. § 240.10b–5 (1998).
9. 73 F. Supp. 798 (E.D. Pa. 1947).
10. J. I. Case v. Borak, 377 U.S. 426 (1964).
11. 347 U.S. 483 (1954).
12. 381 U.S. 479 (1965).
13. JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA (1976).
14. Francis Gibb & Nicholas Wood, *Justice for the Middle Class in Law Reform*, TIMES OF LONDON, Oct. 4, 1997, at 1, *available in* 1997 WL 9233653.

this country there are some who would emulate everything that is wrong with the British system.

Now, we recognize that the PSLRA is not the end of the attack on the civil justice system and that it did not achieve all of the goals of its proponents. Our system has other dangers. A subtle danger, which a commentator referred to in a panel yesterday, is the failure to appoint judges to fill vacancies. Without enough judges and with the pressing requirements of the criminal justice system, the civil justice system is under very serious—though subtle—attack.

It is ILEP's goal to improve the understanding, not only of what is wrong, but also what is right and beneficial and good about our legal system.

We are not Pollyannas. We do not intend to ignore the abuses, and we recognize the need to correct defects. But, we do not want to exaggerate these defects to the point of jettisoning the fundamental attributes of our system. A few speakers in this conference used the adage, "Don't throw out the baby with the bathwater." I remember hearing that adage in a First Amendment lecture by Professor Zechariah Chafee in 1951 or 1952 when I was in college. He was talking about the adoption of the McCarran Act and some of the other excesses of the McCarthy era, and he then used a more vivid metaphor that I think is applicable here: "Mama get a hammer, there's a fly on baby's head." That seems to be the way some powerful interests have attempted to address problems, some real, some imagined. We can improve our system, but we have to recognize what is good about it. It is to the end of shedding light on these issues and improving our justice system that ILEP intends to continue to play a role.

I would like to thank each of you for participating in this conference. By doing so, you have helped us to achieve our objectives.