

National Judicial Conduct and Disability Law Project, Inc.

From the Selected Works of Zena D. Crenshaw-Logal

Spring January 31, 2012

University of Baltimore Symposium Report: Debut of “The Matthew Fogg Symposia On The Vitality Of Stare Decisis In America”

Zena D. Crenshaw-Logal

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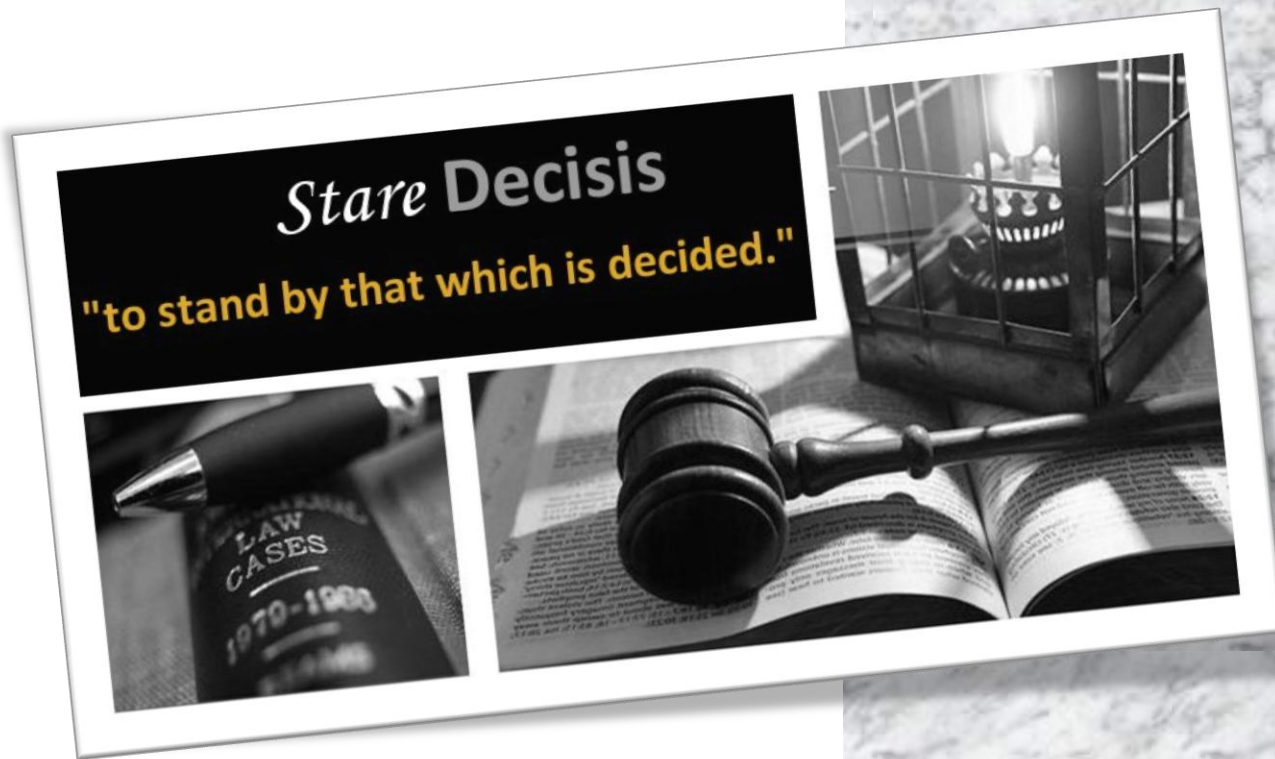
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2012

University of Baltimore Symposium Report

Debut of

THE MATTHEW FOGG SYMPOSIA ON THE VITALITY OF *STARE DECISIS* IN AMERICA



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THE MATTHEW FOGG SYMPOSIA ON THE VITALITY OF *STARE DECISIS* IN AMERICA

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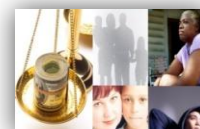
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Acknowledgments:

Attorney Zena Crenshaw-Logal,¹ Co-Administrator of National Forum On Judicial Accountability (NFOJA) and POPULAR (Power Over Poverty Under Laws of America Restored),² is the principal author of this report. Dr. Andrew D. Jackson who is also a NFOJA and POPULAR Co-Administrator, reviewed drafts of the report and provided editorial comments. Drafts written by attorney Crenshaw-Logal and edited by Dr. Jackson were submitted for review by all panelists who participated in the October 20-21, 2011 symposium of “The Matthew Fogg’s Symposia On The Vitality of *Stare Decisis* In America” at the University of Baltimore. In addition to attorney Crenshaw-Logal, those panelists are attorney Tom Devine of Government Accountability Project (GAP); Professor Kylar W. Broadus of National Black Justice Coalition (NBJC); Professor Jeffrey J. Rachlinski of Cornell University School of Law; Professor Drew Noble Lanier of Lou Frey Institute of Politics and Government, University of Central Florida; Professor Vincent R. Johnson of St. Mary’s University School of Law at San Antonio, Texas; and Professor Terri R. Day of Barry University, Dwayne O. Andreas School of Law.

I. Introduction:

Grassroots advocates, public interest attorneys, and legal scholars gathered in October 2011 at the University of Baltimore for the debut symposium of “The Matthew Fogg Symposia On The Vitality of *Stare Decisis* In America.” Convening such a broad and, in many ways, diverse audience requires the program series to be worthwhile academically, yet have populist appeal. Towards that end, the event website explains:

It is both scholarly and practical to examine the current vitality of *stare decisis* as a legal doctrine in America. That we use Latin to describe the concept suggests it is complex, mysterious, and beyond the cares of most Americans. Yet *stare decisis*, sometimes called the ‘doctrine of precedent’, arguably preserves what is among their most valued treasures, the legitimacy of America’s judiciary. Presumably our administration of justice remains stable, predictable, efficient, and welfare-enhancing by requiring courts to follow earlier resolutions of cases with comparable facts, circumstances, and/or law known as precedent.

¹ Bar admissions limited to the Seventh Circuit, U.S. Court of Appeals.

² Formerly POPULAR, Inc.

Speaking for National Forum On Judicial Accountability (NFOJA), a symposia co-sponsor, attorney Zena Crenshaw-Logal added during opening remarks at the University of Baltimore: “This symposium has been promoted as a gathering of key players in America’s legal system, i.e. current and budding legal professionals, law professors, and litigants; These are the groups at the forefront of executing, utilizing, fashioning, and refining America’s legal system.”

On the first of each two day symposium³ of the Fogg symposia, lawyers representing NGOs in the civil rights, judicial reform, and whistleblower advocacy fields are to share relevant work of featured legal scholars in lay terms; relate the underlying principles to real life cases; and propose appropriate reform efforts. Four (4) of the scholars spend the next day relating their featured articles to views on the vitality of *stare decisis*. Specifically, the combined panels of public interest attorneys and law professors consider whether compliance with the doctrine is reasonably assured in America given the:

1. considerable discretion vested in federal trial judges through the “plausibility pleading” requirements of *Bell Atlantic Corp. v. Twombly*⁴ and *Ashcroft v. Iqbal*⁵;
2. dynamics of judicial self-discipline; and
3. impediments to effectively challenging apparent judicial motives and/or bias, including limitations on lawyer free speech rights.

In other words, “Can America’s administration of justice remain adequately stable, predictable, efficient, and welfare-enhancing given the foregoing factors?”

a. Sponsors -

Legacy Sponsor:

Matthew F. Fogg retired as a Chief Deputy U.S. Marshal with 32 years of outstanding public service. Mr. Fogg graduated from Marshall University in Huntington, West Virginia with a Bachelor of Science degree in Criminal Justice Administration. He was sworn in by the United States Marshals Service (USMS) as a Deputy U.S. Marshal and soon became a highly decorated federal law enforcement officer. Mr. Fogg was cross designated a Supervisory Special Agent "Group Supervisor" in charge of a U.S. Drug Enforcement Administration (DEA) joint drug and gun interdiction - Metropolitan Area Task Force. Later he was promoted to Inspector-In-Charge of the USMS Foreign Fugitive Section linked with the 'International Criminal Police Organization' – INTERPOL, the world’s largest international police organization with 188 member countries involving “who’s who” in worldwide law enforcement personnel.

³ The second symposium of the Fogg symposia is presently scheduled for sometime in the Fall 2012.

Sponsors and panelists for subsequent symposia are being pursued.

⁴ 550 U.S. 544 (2007).

⁵ 129 S.Ct. 1937 (2009).

Mr. Fogg received the District of Columbia, U.S. Attorney, and Federal Bar Association's highest law enforcement awards for tracking down over 300 of America's most-wanted and dangerous fugitives charged with prison escape, murder, rape, child molestation, robbery, illegal narcotics trafficking, and other heinous crimes in the U.S. and abroad.

Mr. Fogg is nationally known as a civil rights law enforcement icon after receiving a 1998, landmark Title VII civil rights verdict against his employer in federal court for the District of Columbia. The jury awarded him \$4-million, "finding" the USMS under supervision of the United States Department of Justice (DOJ) was operating as a 'Racial(ly) Hostile Environment' for all African American deputy U.S. marshals nationwide. In 2008, Mr. Fogg received the NAACP prestigious "Barrier Breakers" award as an "(American) who blazed a path for others", and for his valiant stand against all odds behind the federal blue wall of silence.

Originally trained by the USMS as an Equal Employment Opportunity (EEO) Collateral Duty Expert – Mr. Fogg later voluntarily utilized his formal skills to win many favorable decisions before the U.S. EEO Commission by personally representing other federal employees who blew the whistle on various forms of discrimination in the U.S. and Korea. He also advocates for the civil rights of citizens who are in fear of police misconduct and brutality. He has provided expert commentary on T.V. and radio such as CNN, CBS, C-Span; and print media such as the N.Y. Post, Washington Post, Final Call, Vanity Fair, People Magazine, and other publications.

Mr. Fogg's motto: "I only regret that I have but one life to live defending the human rights of others."

NGO Co-Sponsors:

- **Government Accountability Project (GAP)**⁶ - Founded in 1977, GAP is the nation's leading whistleblower protection and advocacy organization. Located in Washington, D.C., GAP is a nonpartisan, public interest group. In addition to focusing on whistleblower support in its stated program areas, GAP leads campaigns to enact whistleblower protection laws both domestically and internationally. GAP also conducts an accredited legal clinic for law students, and offers an internship program year-round.
- **National Black Justice Coalition (NBJC)**⁷ - Since 2003, NBJC has provided leadership at the intersection of mainstream civil rights groups and mainstream LGBT organizations, advocating for the unique challenges and needs of the African American LGBT community that are often relegated to the sidelines. NBJC envisions a world where all people are fully-empowered to participate safely, openly and honestly in family, faith and community, regardless of race, gender identity or sexual orientation.

⁶ www.whistleblower.org

⁷ www.nbjc.org

- **National Forum On Judicial Accountability (NFOJA)⁸** - NFOJA is a grassroots, judicial reform initiative. It strives to get past debates on judicial integrity with workable solutions to help ensure America's judiciary is unbiased, remains faithful to the Constitution, and follows the rule of law.
- **POPULAR⁹** - POPULAR (formerly POPULAR, Inc.) is an acronym for "Power Over Poverty Under Laws of America Restored" and a legal reform organization, committed to helping poor and other disadvantaged people access affordable and competent legal representation, appropriate judicial oversight, and important civil and criminal justice system reforms.

b. Panelists –

Co-Sponsoring NGO Representatives:

- **Attorney Tom Devine is Legal Director of Government Accountability Project (GAP).** He has been with GAP since January 1979. Attorney Devine has been a leader in campaigns to pass or defend major national and international whistleblower laws, including every one enacted over the last two decades. These include the Whistleblower Protection Act of 1989 for federal employees; seven breakthrough laws since 2002 creating the right to jury trials for corporate whistleblowers; and new U.N., World Bank and African Development Bank policies legalizing public freedom of expression for their own whistleblowers.

Attorney Devine has assisted over 5,000 whistleblowers in defending themselves against retaliation and in making a difference, such as shuttering accident-prone nuclear power plants, checkmating repeated industry ploys to deregulate government meat inspection, and blocking the next generation of bloated and porous "Star Wars" missile defense systems. He has served as "Ambassador of Whistleblowing" in over a dozen nations on trips sponsored by the U.S. State Department.

Attorney Devine has authored or co-authored numerous books, including *Courage Without Martyrdom* and *The Whistleblower's Survival Guide*, law review articles, and newspaper op-eds, and is a frequent expert commentator on television and radio talk shows. In October 2011, his book, *The Corporate Whistleblower's Survival Guide: A Handbook for Committing the Truth*, received the International Business Book of the Year award at the Frankfurt Book Fair. He is a recipient of the "Hugh Hefner First Amendment Award" and the "Defender of the Constitution Award" bestowed by the Fund for Constitutional Government. In 2006, Attorney Devine was inducted into the Freedom of Information Act Hall of Fame. He is a Phi Beta Kappa honors graduate of Georgetown University and earned his J.D. from the Antioch School of Law.

⁸ <http://50states.ning.com>

⁹ www.popular4people.org

- **Professor Kylar W. Broadus serves on the Board of Directors for National Black Justice Coalition (NBJC).** He is an associate professor of business law at Lincoln University of Missouri, a historically black college where he serves as chair of the business department. Professor Broadus has maintained a general practice of law in Columbia, Missouri since 1997. Formerly, Professor Broadus served as State Legislative Manager and Counsel at the Human Rights Campaign, the nation's largest gay, lesbian, bisexual and transgender advocacy group.

Professor Broadus published “The Evolution of Employment Discrimination for Transgender People” in 2006 in *Transgender Rights* by Currah, Juag and Minter, among other publications.

In August 2005, Professor Broadus and two co-panelists were the first to present information before the American Bar Association regarding transgender clients. In 2004, he spoke at the Regional Affirmative Action Conference on Transgender Issues and Affirmative Action.

In January of 2003, Professor Broadus was called before the American Association of Law Schools on transgender issues. In February of 2003, he presented at Georgetown Law School's Symposium on Gender and the Law on the same issue. He continues to speak and lobby on the national, state and local levels in the areas of transgender and sexual orientation law and advocacy.

- **Attorney Zena Crenshaw-Logal is Co-Administrator of National Forum On Judicial Accountability (NFOJA) and POPULAR (Power Over Poverty Under Laws of America Restored).** She co-founded and serves on the Board of Directors, Executive Committee, of National Judicial Conduct and Disability Law Project, Inc., the nonprofit corporation that sponsors NFOJA, POPULAR, and OAK (Organizations Associating for the Kind of Change America Really Needs). OAK is a national coalition of grassroots advocates for which attorney Crenshaw-Logal is Co-Administrator. She is author of “The Official End of Judicial Accountability Through Federal Rights Litigation: *Ashcroft v. Iqbal*”, 35:1 *Am. J. Trial Advoc.* (forthcoming).¹⁰

Prior to becoming a full-time good government and legal/judicial reform advocate, attorney Crenshaw-Logal practiced general civil law consisting primarily of her prosecuting relatively complex, plaintiffs' personal injury claims and advising small to medium nonprofit as well as for-profit entities. She is presently a member of the bar for the Seventh Circuit Court of Appeals.

In coordinating the Fogg symposia, attorney Crenshaw-Logal often quoted and quotes her former law school classmate, Dr. Ndiva Kofele-Kale. Dr. Kofele-Kale is an esteemed political scientist, an international law scholar, and the “University Distinguished Professor & Professor of Law” at Southern

¹⁰ Presently available at http://works.bepress.com/zena_crenshaw-logal/1/

Methodist University, Dedman School of Law. He says “(a)n implicit or explicit call for change, resonating in the work of a country’s brightest scholars, the discourse of its public policy thought leaders including mainstream as well as grassroots advocates, and the hearts of its most enlightened citizenry, is a mandate for government reform, no matter how dramatic.”

Attorney Crenshaw-Logal completed a summer semester at the Notre Dame Law Centre in London, England and graduated from Northwestern University School of Law, distinguished as a Notre Dame as well as an Earl Warren Scholar. She has authored multiple online and print articles on grassroots advocacy, First Amendment issues, democracy, and the administration of justice in America. Attorney Crenshaw-Logal is a national spokesperson on tactics thwarting proper standards for regulating First Amendment activities among lawyers when their criticism of the judiciary or a judicial officer is involved.

Legal Scholars and Featured Articles:

- **Professor Jeffrey J. Rachlinski** is an innovator in both administrative law, and in social psychology and the law. He is author of our featured article “*Iqbal* and the Role of the Courts: Why Heightened Pleading—Why Now?”, 114 *Penn St. Law Review* 1247 (Spring 2010).

Since he joined the Cornell Law School faculty in 1994, less than a year after receiving a Ph.D. in Psychology and a J.D. from Stanford University, Professor Rachlinski has offered new perspectives on the influence of human psychology on decision-making by courts, administrative agencies, and regulated communities. Professor Rachlinski's unique analytical viewpoint has led him to explore varied topics in legal practice such as litigation strategies, punitive damages, administrative law, environmental law, and products liability. One of the most versatile scholars at Cornell Law School, Professor Rachlinski has taught social and cognitive psychology for lawyers, administrative law, environmental law, civil procedure, and torts.

Professor Rachlinski's many publications include an article he co-authored, “Inside the Judicial Mind”, 86:4 *Cornell Law Review* (2001). It reports “the results of an empirical study designed to determine whether five common cognitive illusions (anchoring, framing, hindsight bias, inverse fallacy, and egocentric biases) would influence the decision-making processes of a sample of 167 federal magistrate judges.”

- **Professor Drew Noble Lanier** is Associate Professor of Political Science in the Department of Political Science at the University of Central Florida and a Fellow in the Lou Frey Institute of Politics and Government. He co-authored our featured article “In The Eye Of The Hurricane: Florida Courts, Judicial Independence, And Politics”, 29 *Fordham Urb. L. J.* 1029 (2001 - 2002).

Professor Lanier concentrated in American politics with an emphasis on judicial politics for his Ph.D. in 1997 from the University of North Texas. He received his J.D. from DePaul University College of Law in 1990. Professor Lanier's many publications include the 2003 book, *Of Time and Judicial Behavior: Time Series Analyses of United States Supreme Court Agenda-Setting and Decision-making, 1888-1997*, as well as a 2006 book, *The State of Judicial Selection*, which Professor Lanier co-authored with M.S. Hurwitz.

Professor Lanier has given over 150 interviews to local, regional, national and international media outlets. He has practiced law as a solo practitioner and as a civil litigator for Hughes, Watters & Askanase, L.L.P., Houston, Texas.

- **Professor Vincent R. Johnson** teaches and writes principally in the areas of Tort Law, Legal Ethics, Remedies, and Legal Malpractice at St. Mary's University School of Law at San Antonio, Texas. He is author of our featured article "The Ethical Foundations of American Judicial Independence", 29 *Fordham Urban L. J.* 1007 (2001- 2002).

After completing his studies at Yale Law School, Professor Johnson served as a Law Clerk to the Honorable Bernard S. Meyer of the New York Court of Appeals and the Honorable Thomas E. Fairchild, Chief Judge of the United States Court of Appeals for the Seventh Circuit.

Professor Johnson is a recipient of the "Administration of Justice Award", presented at the Supreme Court of the United States in 2006, by the Supreme Court Fellows Alumni Association "in recognition of many contributions to the understanding of the American legal system through a distinguished career teaching law."

Professor Johnson is a prolific writer. His articles have been cited, quoted and discussed in more than 145 law reviews. He has authored and edited multiple books including *A Concise Restatement of the Law Governing Lawyers*, (ALI 2007) co-edited with Susan Saab Fortney. Professor Johnson received his J.D. from the University of Notre Dame School of Law and his LL.M. from Yale University School of Law. His many professional associations include the "Association of Professional Responsibility Lawyers".

- **Professor Terri R. Day** teaches in the areas of Constitutional Law, Torts, Professional Responsibility, and First Amendment at the Barry University, Dwayne O. Andreas School of Law. She is author of our featured article "Speak No Evil: Legal Ethics v. First Amendment", 32 *J. Legal Prof.* 161 (2008). Professor Day has authored several law review articles and has been cited by other articles and the Ninth Circuit Court of Appeals.

Professor Day was Editor-in-Chief of The Florida Law Review. After earning her J.D. degree, she served as Law Clerk to the Honorable Patricia C. Fawcett, U.S. District Court Judge, Middle District of Florida. Professor Day then

received her LL.M. at Yale Law School. She is founding faculty of Barry Law School.

Professor Day is a member of the Florida Bar, was a member of the Florida Bar Standing Committee on Professionalism, and has served as chair of the Unlicensed Practice of Law Committee.

Professor Day has written in the areas of torts, professional responsibility, and First Amendment. Prior to becoming a lawyer, Professor Day worked in the areas of social work and the media. She co-chaired a project which documented the testimonies of Holocaust survivors and co-produced a documentary on the subject. She has also implemented a consumer hotline with a local TV station.

Professor Day was a visiting Fulbright Professor at the University of Sarajevo from October 2000 to July 2001 and again from February 2002 to August 2002. She has written in the area of Restorative Justice and its application to Bosnia Herzegovina. In addition to teaching in Bosnia, Professor Day has been a guest lecturer in Lithuania and Serbia.

II. Overview of *Stare Decisis*:

“(I)n (America,) *stare decisis* is generally understood to mean that precedent is presumptively binding. In other words, courts cannot depart from previous decisions simply because they disagree with them. However, they can disregard precedent if they offer some special justification for doing so.”¹¹

III. The *Twombly* and *Iqbal* Backdrop:

In its 1957 decision, *Conley v. Gibson*,¹² the U.S. Supreme Court confirmed that “Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim”, noting “(t)o the contrary, all the Rules require is ‘a short and plain statement of the claim’ that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”¹³

A 2010 “Issue Brief” by lawyers for the NAACP Legal Defense Fund explains that . . .

(f)or five decades after *Conley*, the Supreme Court repeatedly affirmed this ‘fair notice’ approach designed to prevent excessive obstacles at the pleading stage and facilitate adjudication of civil rights claims and other litigation on the merits.

¹¹ Healy, Thomas. “*Stare Decisis* As A Constitutional Requirement”, 104 *W. Va. L. Rev.* 43 at 52 (Fall, 2001). (internal footnotes omitted).

¹² 355 U.S. 41 (1957).

¹³ *Id.* at 47.

...

Cracks in *Conley's* foundation emerged (five) years ago in *Bell Atlantic Corp. v. Twombly*. The 7-2 majority opinion, . . . held that, at least with respect to antitrust claims, *Conley's* no-set-of-facts language 'has earned its retirement.' Instead, *Twombly* promulgated a new and stricter 'plausibility' standard, ruling that a plaintiff in an antitrust case will survive a motion to dismiss only if he or she pleads 'enough facts to state a claim to relief that is plausible on its face.'

Twombly left open whether this new plausibility standard broadly applied to all civil cases. (In a 2009 decision,) *Ashcroft v. Iqbal*, the U.S. Supreme Court made clear that it did.

...

In *Iqbal*, a Muslim Pakistani citizen—arrested along with hundreds of other individuals in the days following the September 11, 2001 terrorist attacks and detained in federal custody—alleged that he was subjected to an unconstitutional policy of 'harsh conditions of confinement on account of his race, religion, or national origin.' In addition to suing lower-level prison officials, *Iqbal* named former U.S. Attorney General John Ashcroft as the 'principal architect' of the policy and identified FBI Director Robert Mueller as 'instrumental in [its] adoption, promulgation, and implementation.'

Writing for a narrow five-justice majority, Justice Kennedy did not question the right of plaintiff Javaid Iqbal to proceed with his lawsuit against lower-level prison officials (who subsequently settled). But the Court held that the claims against Ashcroft and Mueller should be dismissed because *Iqbal's* complaint did not plead facts 'sufficient to plausibly suggest [their] discriminatory state of mind.' For a complaint to survive a motion to dismiss under the new plausibility standard, *Iqbal* clarified that the litigant must plead specific and non-conclusory 'factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.' In making that determination, a court is to 'draw on its judicial experience and common sense.' Applying this standard, the Court considered whether it was more plausible that lawful or discriminatory intent motivated Ashcroft and Mueller and found the former was more 'likely.'¹⁴

Iqbal provides, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]' — 'that the pleader is entitled to relief'."¹⁵

¹⁴ Civin, Joshua and Adegbile, Debo P. "Restoring Access to Justice: The Impact of *Iqbal* and *Twombly* on Federal Civil Rights Litigation", American Constitution Society for Law and Policy. Issue Brief, pp 3-4 (September 2010). (internal footnotes omitted).

¹⁵ *Iqbal* at 1950.

IV. Executive Summary:

Attorney Thomas Healy concedes that his article "*Stare Decisis As A Constitutional Requirement*", "... does not address the important question of what circumstances justify the overruling of prior decisions."¹⁶ Perhaps a more important consideration is the benefactor of judicial power when a court sustains or overrules precedent. Professor Terri R. Day explains:

(W)e would not have all those implied but constitutionally recognized fundamental rights if judges "stuck to" *stare decisis*. It is important to remember that *stare decisis* is a judicially created doctrine to ensure judicial restraint; but, strong adherence to that doctrine can mean that law would be "stuck in time." Although not universally accepted, the notion of the constitution as a living, breathing document requires judges to depart from *stare decisis* in order to keep the constitution and our laws relevant to modern life.

Attorney Zena Crenshaw-Logal interjected that "*Iqbal* may have seriously wounded, if not slain *stare decisis* on the altar of national expedience, fashioned without the niceties of democratic process." Professor Jeffrey R. Rachlinski noted in response:

... there are really twin criticisms of *Iqbal* that this conclusion lumps together; one is that the embrace of an institutional perspective on the civil litigation process badly threatens the power of individuals to use access to the courts as a check on institutional abuses. The other complaint is procedural, in that the court bypassed the normal channels for amending the Federal Rules of Civil Procedure. The latter point speaks most closely to the concept of *stare decisis*, to my eyes (although the former point is not unrelated, in that *Iqbal* is giving trial judges enormous discretion in a way that might subvert the rule of law). It thus is not so easy to sum up.

All the foregoing points were first made or re-emphasized during the editing of this report. Collectively, they hearken to laws and rules for construing statutes as well as state constitutions and the U.S. Constitution; the concept of vertical *stare decisis*¹⁷; fear of tyranny in a loose and strict sense of the term; and concerns about the extent, if any, that courts should be impacted by democratic processes. Arguably percolating in the

¹⁶ 104 W. Va. L. Rev. 43 at 53 (Fall, 2001).

¹⁷ Attorney Healy explained: "(My) Article also does not address the obligation of lower courts to follow the decisions of higher courts, which is sometimes misleadingly referred to as vertical *stare decisis*. This obligation does not derive from the mere existence of the decisions, but from the hierarchical relationship of the courts and is therefore fundamentally different from horizontal *stare decisis*. For a complete discussion of the constitutional and pragmatic aspects of vertical *stare decisis*, see Evan H. Caminker, Why Must Inferior Courts Obey Supreme Court Precedents?, 46 STAN. L. REV. 817 (1994)." *Id.* at footnote 53.

background are U.S. Tenth Amendment issues – not a federal government versus states’ rights debate, but more a clash of “the people” with special interests.¹⁸

Professor Day shared these important views:

...

I felt like your report did not reflect the idea that while it may not be a (perfect) system, if we compare it to the rest of the world, many would say there is none better. I'm forgetting which great mind said that about democracy.¹⁹

I realize the purpose of the symposium is to think of ways to make it better and the system's failures are real and well-documented. I guess I would start at a different place in the analysis. Like so much with our American constitutional system, in theory, it is brilliant, in practice very flawed.

I just think the report should reflect the basic premise (I thought shared by the other academics, but if not, then my view): a judicial system that "checks" we the people is not altogether bad. That really is my only point. (don't throw away the baby with the bath water concept as we focus on improving the system).

Of course *stare decisis* is necessarily a gem for anyone duly protective of America’s justice system. The doctrine serves to preserve victories of “the people”, sometimes carved in the face of blistering dissent that legislatures and/or the passage of time may nonetheless embrace, warranting a shift in precedent. This report champions such independence, though some may not easily agree that it does.

Professor Day indicates that “(s)ome of the discussion confuses errant judges with the courts as an institution.” She cautions:

Like in any branch of government or institution, there can be bad judges. But the institution as a whole has balance. There is the appellate process and ways of "correcting" Supreme Court decisions, either through new legislation or the amendment process. (I am referring to the federal system).

I realize that I am talking theory, and in practice, there are always obstacles to realizing the theoretical ideal. Also, the principles may not apply so even handedly on a case-by-case basis.

¹⁸ “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.” U.S. Constitution, Amendment X.

¹⁹ Winston Churchill reportedly commented, “(i)t has been said that democracy is the worst form of government except all the others that have been tried.”

Perhaps coming full circle, and making the case for doctrines of judicial restraint (which includes *stare decisis*), federal judges should not apply their own preferences, but neither should courts decide based on populace sentiment – then, there would be no checks and balances with the other branches of government. To the extent that this point is theoretical, academics should highlight the principles and theory, even if they get “muddled” in translation from the academic to the practice.

I would make one other point that is more practical. Any decision-maker, whether judges, jurors, legislators – naturally filters through his or her own lens of experiences. Maybe, the federal bench does not reflect enough diversity. But, again, the remedy for this should not be citizen oversight or making the judicial branch more like the legislative branch.

Even widespread populace sentiment can be the antithesis of rights reserved to “the people”. So the struggle at hand is not between elites and ordinary people; judges and litigants. Instead, this report challenges any and all subversions of “the people” through exercise of judicial power.

Attorney Crenshaw-Logal recounts that “. . . under current oversight mechanisms, judges are unlikely to be reversed on appeal, investigated, reprimanded, and/or prosecuted – even when their departures from precedent are inexplicable and sustained, arguably to the point of 18 U.S.C. 241 and/or 242 violations.” Yet she added in response to Professor Day:

I support everything Professor (Vincent R.) Johnson suggested must be done to combat threats to *stare decisis*. The solution(s) certainly entail(s) more than clamping down on judges. And I recognize that pristine equal justice is impossible. But several aspects of America's legal system that I monitor have converged to create a great need for the kind of conversation we began last October.

Undoubtedly it is counter-intuitive for many to champion judicial independence by scrutinizing judges. Others will likely resist being protective of judges to ensure judicial accountability. But this report, as does attorney Crenshaw-Logal, suggests:

It's time for America to treat its judiciary like the jewel that it is, *i.e.* we very much need to move towards properly funding our courts. Also, arrangements should be made to bring the citizenry more in on court operations through civics education; expanded media coverage (both mainstream and alternative media); limited academic analysis of federal appeals upon SCOTUS (certiorari) denial; and government sanctioned, direct citizen oversight of state judicial disciplinary processes much like NFOJA proposes. Finally, we need federal judicial whistleblower protection and possibly, nationalized regulation of lawyer speech rights.

This executive summary accordingly ends with these words of Professor Day: “As always, it's wonderful to have this dialogue.”

V. Debut Symposium Recap:

a. Early Considerations and the Specter of Interaction-based Perceptions of America's Judiciary –

“The Matthew Fogg Symposia On The Vitality of *Stare Decisis* In America” – Such a title invites one to consider if judges generally adhere to the doctrine of *stare decisis* in America. Speaking, respectively, for federal government employees, African-American members of the LGBT²⁰ community, and a national grassroots community of reform-minded litigants, attorney Tom Devine, Professor Kylar W. Broadus, and attorney Zena Crenshaw-Logal brought very similar, while significantly different perspectives to bear.²¹

Attorney Tom Devine of the Government Accountability Project (GAP) is a champion of “free speech rights to challenge abuses of power that betray the public trust.” His presentation focused on decisions of administrative law judges with the federal “Merit System Protection Board” (MSPB) which adjudicates alleged “prohibited personnel practices” targeting federal employees, and the board’s appellate court, the Federal Circuit Court of Appeals. According to attorney Devine, these administrative and judicial Article I judges (the Federal Circuit was created by statute) tend to greet federal employee whistleblower claims with “hostile judicial activism.” He describes the jurisprudence as “arbitrary”, indicating it is “not limited to breaking precedent” but encompasses failures to “respect unequivocal statutory language.”

Attorney Devine shared a series of MSPB and Federal Circuit Court rulings, summarized later in this report,²² indicating they among others are “destructive of free speech rights of government whistleblowers”. He asserts that the “consequences are extremely severe on a case by case basis.” He further explains, in “departing arbitrarily” from “longstanding judicial doctrine” and “clear statutory language”, quasi-judicial agencies and the Federal Circuit court monopoly leave government whistleblowers and their advocates “not (knowing) what we can count on anymore.” Attorney Devine reports the corresponding “fear of the unknown is chilling.”

Professor Kylar W. Broadus of National Black Justice Coalition (NBJC) chronicled the employment-related and broader social struggles of many Americans in the LGBT

²⁰ The initialism refers collectively to lesbian, gay, bisexual, and transgender people.

²¹ Joining attorney Devine’s presentation was Shonali Routray, a Pegasus Scholar and Legal Director of “Public Concern at Work” (PCaW), the United Kingdom’s leading NGO focusing on whistleblowing. Ms. Routray subsequently authored the online article “Judicial Accountability and *Stare Decisis* – Should the US be Learning from the UK?”, accessible at <http://tiny.cc/9re12>

²² See this report section V.e, “Where has all the predictability, efficiency, and welfare-enhancement gone?”

community. Those accounts are summarized later in this report.²³ Professor Broadus described them as “on the cutting edge of civil rights”; matters that may be and arguably have been unfairly addressed by law and/or equity due to ignorance (i.e. lack of relevant information), misperceptions, stereotyping, and extreme bias among judges.

Professor Broadus’ presentation evidenced the fertile ground for miscarriages of justice facilitated by *Iqbal*,²⁴ a prospect that grew clearer as Fogg’s debut symposium progressed. Professor Broadus explained, “we don’t want courts to summarily dismiss (our) cases or dismiss the nuances that are biases in the system.” Regarding *stare decisis*, he reported the LGBT community and their advocates are quite “concerned about preserving (our court victories)”, noting: “(T)he protections are essential. . . . It has only been in the last decade or so that advocates have gained strides in rights, recognition, and protections. There are still no federal level protections for LGBT people, particularly in employment, safe schools, and for marriage equality to name a few – which is why it is even more important to preserve those won.”

Attorney Zena Crenshaw-Logal of National Forum On Judicial Accountability (NFOJA) and POPULAR (Power Over Poverty Under Laws Of America Restored) explained:

NFOJA and (its sister organization, POPULAR,) represent a certain group of legal system users – litigants; plaintiffs and defendants; complainants and respondents. The tie binding us is what we see as a lack of predictability and efficiency in our encounters with America’s legal system when stability, predictability, efficiency, and welfare-enhancement should be the byproduct of *stare decisis*; appropriate adherence to precedent.

Groups like NFOJA and POPULAR exist because of arguable departures from precedent and inefficiency that not only offend *stare decisis*, but suggest a systemic malfunction of America’s legal system. Of course these are troubling perceptions often attributed to misunderstandings of law and the proper function of courts. So attention turns to the nature and quality of civics education, legal training, professional experience, intelligence, reputation, mental health These traits or factors impact the weight and credibility of legal system and judicial critiques. Yet a simple test confirms the proper functioning or may suggest a major malfunction of American courts.

We can simply consider whether the outcome of any legal case resolved in the U.S. is fair, given the fair and impartial administration of justice as the

²³ The referenced anecdotes respond to Professor Drew Noble Lanier’s indication that “. . . ‘judges who are free from potential domination by other branches of government’ are judicially independent” at this report’s subsection V.c.2.

²⁴ “(W)hen courts are told to draw on experience and common sense that means that predictability will vanish because every judge has had different experiences and has a different definition of common sense. What we will see is that depending on a judge’s views of various types of claims, one judge will dismiss a claim where another would have let it survive.” Scheindlin, Shira A. Judge, U.S. Dist. Ct., S. Dist. of N.Y. – *Inn of Court Dinner Remarks*, “The Future of Litigation”, pp 4-5 (13 January 2010). Available at <http://www.nylj.com/nylawyer/adgifs/decisions/020510scheindlin.pdf>

proper function of our judiciary. That's right, a common sense notion of fairness is the basic litmus test for determining whether America's judiciary, hence our legal system and courts function properly. And *voila*, the playing field is leveled for our analysis of *stare decisis*. Common sense qualifies us to participate as we'll be making assessments largely based on common sense notions of fairness.

Attorney Crenshaw-Logal went on to attest, "I've been a full time judicial reform advocate since 1998, working on a national basis since 2003, and in the process I interact with countless numbers of people across the U.S. who are in or trying to survive court proceedings that just don't seem fair."

Professor Jeffery J. Rachlinski noted the contrast between symposium panelists who are academicians and those who are legal practitioners and/or part of government watchdog organizations with the latter being less inclined to credit judges as a group with fidelity to the law. Interestingly, the professors' reported esteem for America's judiciary is traceable in substantial part to their judicial clerkships, social interactions as well as research and/or writing endeavors with judges, plus their study of and exposure to foreign legal systems. Apparently these experiences leave them describing America's legal system as flawed, but "pretty good" in Professor Rachlinski's words, as compared to the "system in trouble" he thought advocate-panelists portrayed at the University of Baltimore.

b. Dispelling the Risk of Rampant Second-guessing of Judges

The dimmer view of America's judiciary shared by multiple symposium participants including attorneys and lay advocates, soon prompted participating law professors to emphasize judicial independence. Professor Terri R. Day most emphatically condemned the idea of sanctioning citizen panels to scrutinize judicial decisions. Professor Drew Noble Lanier especially stressed the hazard of drawing conclusions about judges in the aggregate, from anecdotes and/or single court decisions. He and Professor Day particularly underscored the discretionary nature of judicial decisions and requisite balancing of law (which may be obscure), public policy, and other considerations that even sophisticated overseers may not fully appreciate.

While Professor Vincent R. Johnson acknowledged the usefulness of "scholarly (judicial) criticism", his co-panelist Professor Lanier denounced taking "pot shots" at court decisions. He joined Professor Day in deriding "pop culture" and "major media" as accurate barometers of judicial integrity or the lack thereof. Professor Rachlinski further warned that "attempts to rein judges in" tend to thwart judicial independence more than judicial misconduct – a phenomenon Professor Lanier attributed to the "law of unintended consequences".

Of course the core question of Fogg's symposia is whether compliance with *stare decisis* can be reasonably assured given certain prescribed factors. That inquiry is substantially different than assessing the extent of compliance or non-compliance with *stare decisis* among judges. So rampant second-guessing of court decisions should not be a byproduct of our symposia at hand.

c. Defining the Context for Evaluating the Vitality of *Stare Decisis* in America

1. Featured Scholar, Professor Jeffrey J. Rachlinski –

Professor Jeffrey J. Rachlinski's featured article is "*Iqbal* and the Role of the Courts: Why Heightened Pleading—Why Now?", 114 *Penn St. Law Review* 1247 (Spring 2010). The title poses questions amenable to a variety of appropriate answers. While speaking at the University of Baltimore, Professor Rachlinski conceded that his answer may not be a "slam dunk". But the response is certainly profound given his expertise expressed in part by "Blinking on the Bench: How Judges Decide Cases",²⁵ an article co-authored by Associate Dean for Academic Affairs and Professor of Law Chris Guthrie, the Honorable Judge Andrew J. Wistrich, and Professor Rachlinski.

The abstract for "Blinking on the Bench" describes its technical content in simple terms:

How do judges judge? Do they apply law to facts in a mechanical and deliberative way, as the formalists suggest they do, or do they rely on hunches and gut feelings, as the realists maintain? Debate has raged for decades, but researchers have offered little hard evidence in support of either model. Relying on empirical studies of judicial reasoning and decision making, we propose an entirely new model of judging that provides a more accurate explanation of judicial behavior.²⁶

...

How suitable it is for a legal scholar with insights from such a project to deduce and propose motivations for *Iqbal*.

Professor Rachlinski shared several concepts and findings at Fogg's debut symposium that are referenced, directly or indirectly, by this passage from "Blinking on the Bench":

Given the central role that judges play in the justice system both inside and outside the courtroom, reformers must understand judicial decision making before they can reshape the justice system to meet the needs of litigants and society. Our model raises two questions about judging. First, which decision-making approach—intuitive or deliberative—is more likely to produce accurate outcomes? Although we believe that intuition can be surprisingly accurate, we also believe that an excessive reliance on intuition will lead to erroneous judicial decisions.²⁷

...

Iqbal, according to Professor Rachlinski, embraces if not fosters intuitive judicial decisions.

²⁵ 93:1 *Cornell L. Rev.* 101 (2007-2008).

²⁶ *Id.*

²⁷ *Id.* at 128.

Exact statistics or similar measurements of *Iqbal*'s impact on federal cases were not presented to Fogg's audience at the University of Baltimore. Professor Rachlinski suggested, instead, that *Iqbal* is a tool for promptly clearing highly subjective, contentious, arguably anti-establishment claims from court dockets. His featured article suggests the foreboding of such a tool with these words: "Determining who is allowed to invoke the machinery of the civil justice system, and under what circumstances they may do so, lies at the core of how a system of law defines itself."²⁸

"*Iqbal* and the Role of the Courts" recounts "... attitudes that motivated the adoption of the Federal Rules of Civil Procedure in the 1930s", concluding "(t)he reforms ... reflected a faith in individualism and professionalism" – the notion that "(a)ttorneys could be trusted to pursue claims that are apt to have merit."²⁹ In contrast, "(a)n assessment of the various parts of *Iqbal*'s holding ... reveals a ... reluctance to allow individuals to use access to the courts (and discovery) as a means of scrutinizing institutional actors."³⁰ Professor Rachlinski assured Fogg's University of Baltimore audience that the corresponding shift in pleading standards is tantamount to amending the Federal Rules of Civil Procedure, albeit without the constraints of Congress' Rules Enabling Act.

Whether *Iqbal* expounds upon or amends federal trial rules, its holding, in Professor Rachlinski's view, "... reflects a faith that actors in the large institutional settings of the federal government and corporate structures are worthy of some measure of trust." Professor Rachlinski adds, "(i)t is not that the landscape of civil litigation has changed so much as the perspective of the members of the judiciary has changed."³¹ He explains:

Taken together, the circumstances that gave rise to the *Iqbal* decision can be understood as a confluence of events. Judges who themselves spent most of their careers in loyal and honest service to institutions might feel little need to allow open-ended investigations of these institutions by private actors, absent some overt evidence of wrongdoing. An increasingly global perspective on the role of courts and judges helps this view along, as the system of notice pleading and generally unsupervised discovery is highly unusual. The events of 9/11 and a discomfort with scrutinizing the institutions that are charged with defending against terror attacks complete the picture. Requiring that plaintiffs make out plausible claims before proceeding on to discovery suddenly feels like an idea whose time has come.³²

In other words, *Iqbal* embraces the spirit of the post 9/11 era, in which deference to government officials and other institutional actors has the potential to run roughshod over individual rights and the rule of law.

²⁸ Rachlinski, Jeffrey J. "*Iqbal* and the Role of the Courts: Why Heightened Pleading—Why Now?", 114 *Penn St. Law Review* 1247 (Spring 2010).

²⁹ *Id.* at 1250.

³⁰ *Id.* at 1252.

³¹ *Id.* at 1253.

³² *Id.* at 1255.

2. Featured Scholar, Professor Drew Noble Lanier –

Professor Drew Noble Lanier co-authored the featured article, “In The Eye Of The Hurricane: Florida Courts, Judicial Independence, And Politics”, 29 *Fordham Urb. L. J.* 1029 (2001 - 2002). The article’s introduction promises the writing “will discuss the concept of judicial independence, the political nature of courts, and efforts to insulate courts from the ordinary politics engulfing the popularly elected branches.”³³ Professor Lanier’s presentation at the University of Baltimore confirmed an irony expressed in his featured article: “The key to understanding questions of judicial independence is to appreciate the political nature of courts.”³⁴

“Eye Of The Hurricane” makes clear:

...

When we use the word "politics," we do not employ its pejorative variant. Rather, the definition we attach to politics is derived from the understanding that courts influence the policy-making process. In particular, we adopt the conventional definition of politics in our field: the process by which authoritative decisions are made about the allocation of goods in society. Under this definition, judges have discretion, grounded in their respective jurisdiction, as to what judgments to render and whose interests to protect. They can support certain policies and outcomes while opposing others.³⁵

...

Moreover, “(c)ourts throughout the United States do so on a daily basis without arousing much public interest or controversy.”³⁶

Anyone inclined to dispute a judicial ruling or “. . . attack the legitimacy of (a) court’s decision-making power”³⁷ should consider this definition of judicial independence:

Judicial independence is (a) the degree to which judges believe they can decide and do decide consistent with their own political attitudes, values and conceptions of judicial role (in their interpretation of the law), (b) in opposition to what others, who have or are believed to have political or judicial power, think about or desire in like matters, and (c) particularly when a decision adverse to the beliefs or desires of those with political or judicial power may bring some retribution on the judges personally or on the power of the court.³⁸

³³ Lanier, Drew Noble. “In The Eye Of The Hurricane: Florida Courts, Judicial Independence, And Politics”, 29 *Fordham Urb. L. J.* 1029 (2001 – 2002).

³⁴ *Id.* at 1230.

³⁵ *Id.* (internal footnote omitted).

³⁶ *Id.* (internal footnote omitted).

³⁷ *Id.* at 1031.

³⁸ *Id.* at 1031 citing Becker, Theodore L. “Comparative Judicial Politics: The Political Functioning of the Courts 144 (1970).

The “structural elements”³⁹ required to accomplish this independence are (1). judicial salaries that “cannot be reduced while (recipients are) in office”; (2). “fixed (judicial) tenure”; and (3). judicial selection “through executive appointment that is checked by some other actor or through direct election.”⁴⁰ The essentialness of combining these elements is particularly clear in the context of local and state politics in Florida.

“(F)or all four levels of (Florida state) courts in the judicial hierarchy, (the) second and third indicia of judicial independence – fixed tenure and selection by either election or checked executive appointment – are satisfied.”⁴¹ But “none of the judges in any of (Florida’s state) courts have salary protection.”⁴² The corresponding susceptibility of Florida judges became especially clear as the state’s “heterogeneous regions”⁴³ spawned “shifting loyalties within the Florida electorate (and) exacerbated tension between the judiciary and the democratically-elected branches – the executive and the legislature.”⁴⁴ In fact, “(t)he Florida Supreme Court’s position of ideological congruence with the dominant political culture . . . began to unravel in the 1960s.”⁴⁵

In Spring of 1999, the Florida Supreme Court “. . . came into conflict with the Republican-controlled legislature and Republican Governor (Jeb) Bush . . . for invalidating laws that would have accelerated death penalty executions in the state in the wake of one inmate being bloodied during an electrocution.”⁴⁶ Both Bush and the legislature “threatened to reduce the court’s budget allocation and staffing.”⁴⁷ Subsequently, “. . . voters cast their ballots . . . for the next president of the United States”.⁴⁸ It became “unclear who was the winner (of that race), Republican George W. Bush (brother of then Florida Governor Jeb Bush) or Democrat Al Gore”.⁴⁹

Professor Lanier and his co-author note:

From a political perspective, the Florida Supreme Court became the primary vehicle for maintaining the recount process (a position favorable to Gore) while the U.S. Supreme Court ultimately decided the question by terminating all recounts (a decision favorable to Bush). The ruling majorities for both tribunals were perceived by many as rendering a politically tainted decision, albeit in different directions, thus casting the Florida Supreme Court into the eye of the hurricane as the Florida legislature considered how to react to what it perceived as blatant partisanship by the court’s members.⁵⁰

³⁹ *“Eye of the Hurricane” at 1032.*

⁴⁰ *See, Id.*

⁴¹ *Id. at 1033.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id. at 1036.*

⁴⁵ *Id. at 1037.*

⁴⁶ *Id. at 1045.* (internal footnote omitted).

⁴⁷ *Id. at 1045-1046.* (internal footnote omitted).

⁴⁸ *Id. at 1046.*

⁴⁹ *Id.*

⁵⁰ *Id. at 1049.* (internal footnote omitted).

In due course, “. . . increased partisan influences (were) brought to bear on (Florida’s) judiciary, particularly (its) appellate courts, (serving) to restrain . . . discretion of the state’s courts and hence imperil judicial independence.”⁵¹

The Bush/Gore political contest may have “. . . damaged (Florida’s judiciary) in its efforts to stand apart from the views of the executive or the legislature and exercise discretion concerning what policies to continue and which ones to nullify.”⁵² But judicial appointments, whether by state or federal government, may suborn a partisanship more insidious than political party affiliations. We learn as much from co-panelist Professor Jeffrey J. Rachlinski’s featured article which explains:

(T)he federal judiciary is increasingly staffed with former institutional actors - largely prosecutors. The clearest pathway to a federal judgeship is by working as a U.S. Attorney or in corporate practice. Lawyers whose practice focuses on individual plaintiffs are rarely considered for new federal judgeships. The judiciary has thus become an entity that is staffed with individuals who have some faith in the institutions of government, having spent much of their time working for the government. And private practice for many judges has consisted of big firm, corporate work. Although one can only speculate about the influence that these trends will have, this career path likely undermines the belief that privately implemented civil litigation against institutional actors is . . . an essential component of the rule of law. Even if they opposed the Bush Administration’s approach to addressing terrorism, such actors are unlikely to believe that private litigation by Guantanamo detainees is the most effective means of changing policies. More likely, institutional actors prefer institutional reforms.⁵³

Perhaps Professor Lanier’s conclusion that “. . . ‘judges who are free from potential domination by other branches of government’ are judicially independent”⁵⁴ should be revisited.

Professor Lanier’s featured article confirms that U.S. federal courts have all “the structural elements that must be present for courts to be independent.”⁵⁵ Yet the federal judiciary has a certain homogeneity attendant to being dominated by former institutional actors as Professor Rachlinski describes. Imagine these homogeneous, but presumably ethical, competent “. . . judges (believing) they can decide and (deciding) consistent with their own political attitudes, values and conceptions of judicial role (in their interpretation of the law), . . . in opposition to what others, who (do not) have or are believed to (not) have political or judicial power, think about or desire in like matters, . . . particularly when a decision adverse to the beliefs or desires of those (without) political or judicial power (is unlikely to) bring some retribution on the judges personally or on the power of the

⁵¹ *Id.* at 1050.

⁵² *Id.* at 1052.

⁵³ “*Iqbal and the Role of the Courts*” at 1254.

⁵⁴ “*Eye of the Hurricane*” at 1031.

⁵⁵ *Id.* at 1032. (internal footnote omitted).

court.”⁵⁶ These judges could be unwittingly shackled by their shared mindset or proclivities.

Co-panelist Professor Kylar Broadus warns of a tendency among judges to “trivialize issues” with which they are not familiar. He attests to an overwhelming “lack of understanding” and “curves that are missed” in addressing the legal rights of lesbians, gays, bi-sexual and transgender people. Gay marriage is always the “pink elephant in the room” according to Professor Broadus. He analogized the topic to *Loving v. Virginia*⁵⁷ and its overturn of bars to interracial marriage.

Professor Broadus further explains:

Race, gender, and sexuality aren’t the same but society has discriminated against individuals that fall into these classes when it comes to marriage. The federal Defense of Marriage Act (DOMA) has created problems for marriage equality for lesbians and gay people across the country so high profile cases such as those in California are paramount. California’s Constitutional amendment Proposition 8 banned same sex marriage. The provision was held to be unconstitutional by the California Supreme Court, but was appealed by opponents of same sex marriage and is still being litigated. Since only seven states now recognize marriage equality, the outcome of the California case will gravely impact the landscape of marriage equality in this country.

We also learn from Professor Broadus:

At present, there are approximately 14 states that offer some form of civil unions or domestic partnerships for same sex couples which are not the same as marriage. Marriage offers tax advantages, health benefits, and the Family Medical Leave Act among other things. There are over eleven hundred benefits on the federal level that come with the institution of marriage that do not come with domestic partnerships. With regard to employment, there are no federal employment protections either. The Employment Non Discrimination Act (ENDA) in its current form would provide workplace protections for the LGBT community. Presently, courts have begun to interpret Title VII to include protections, but this has been a large hurdle to overcome. Losing these wins would be great losses.

Professor Broadus made clear to Fogg’s symposium audience that even more fundamental, equal protection challenges face the LGBT community. According to Professor Broadus, an “intersection of race and gender issues” may complicate discrimination claims of lesbians, gays, bi-sexual and transgender people. He described the difficulty in portraying fights between two (2) gay men as domestic violence. He noted how transgender people may be traumatized, both pre and post-transition, by otherwise simple considerations such as

⁵⁶ *Cf. Id. at 1031.*

⁵⁷ 388 US 1 (1967).

bathroom accommodations at work or gender designations on government-issued identification.

Even without knowing misconduct, it seems a judicial bench insensitive to, in Professor Broadus' words, "folks who don't conform to the gender binary", may be less than "independent"; especially if related decisions and the bias they perpetuate, mesh with executive and legislative branches of government as well as dominant political forces. Professor Broadus referenced at the University of Baltimore the difficulty many Americans have mustering stamina and funds to overcome such "hurdles". Co-panelist attorney Zena Crenshaw-Logal explained: "(a)necdotal and some statistical evidence suggest it's often impossible to trigger authentic judicial oversight by any branch of American government without massive public outcry and/or playing into the political or personal agenda of key decision makers." She added, "(p)ivate individuals should not need years of multi-faceted promotion and activism by public interest advocates with multi-million dollar budgets and/or an army of unbelievably committed volunteers, just to have a chance of overcoming even blatant injustice in America."

3. Featured Scholar, Professor Vincent R. Johnson –

The featured article of Professor Vincent R. Johnson is "The Ethical Foundations of American Judicial Independence", 29 *Fordham Urban L. J.* 1007 (2001-2002). The article's first section is "Structural Foundations of Judicial Independence",⁵⁸ a topic co-panelist Professor Drew Noble Lanier also addresses. Professor Johnson confirms that "(s)tate judges may be less independent than their federal counterparts."⁵⁹ In fact Professor Lanier indicates:

Historically, Florida state courts were the non-controversial servants of the state's dominant political forces. That posture is typical of state courts throughout the United States. Since state courts are intimately tied to the political structure of the state, they tend to be creatures of local government infused with local values and mores.⁶⁰

Yet Professor Johnson submits "one could make a strong case that state judges often exercise a high degree of judicial independence".⁶¹ He contends, "(i)f both the federal and state judiciaries exhibit judicial independence, then judicial independence is not simply a function of provisions governing judicial selection, compensation, and retention of office, which differ greatly among the federal and state governments."⁶²

Professor Johnson credits the exceptionalness of America's legal system, largely to ". . . judicial ethical norms that have developed in the United States."⁶³ He explains, "(t)hese norms shape the conduct of American judges on a daily basis and give concrete meaning to

⁵⁸ "The Ethical Foundations of American Judicial Independence", 29 *Fordham Urban L. J.* 1007 (2001-2002).

⁵⁹ *Id.* at 1009.

⁶⁰ "Eye of the Hurricane" at 1037.

⁶¹ "The Ethical Foundations" at 1011.

⁶² *Id.* at 1012.

⁶³ *Id.*

the idea that judges should be free from undue or inappropriate pressures when performing the duties of office.”⁶⁴ The “rules of judicial ethics bearing on judicial independence”⁶⁵ that Professor Johnson references are derived from the ABA Model Code of Judicial Conduct. They relate to *ex parte* communications, gifts, political activities, and “certain problematic relationships.”⁶⁶

While he does not suggest they are a cure-all for any legal system, Professor Johnson concludes:

The independence of the American judiciary depends heavily on the ethical standards that prevent or mitigate harm to the exercise of judicial judgment by inappropriate pressures flowing from activities or relationships involving persons outside the court. Absent those safeguards, the status, operations, and effectiveness of the judiciary would be vastly different from what it is today.⁶⁷

The four (4) most significant threats to *stare decisis* and its role in promoting the rule of law in America that Professor Johnson surmised for Fogg’s symposium audience stem from (1). any and all failures of judicial selection and retention processes to choose and/or retain well-educated, intelligent, honest judges; (2). inadequate funding of America’s judiciary leaving it slow, inefficient, and unable to pay competitive judicial salaries; (3). inadequate education of both the general public and judges on matters essential to the proper functioning of America’s judiciary; and (4). increased blurring of law and partisan politics. Nonetheless, Professor Johnson is of the opinion that related disciplinary processes are doing a “pretty good job”.

4. Featured Scholar, Professor Terri R. Day –

Professor Terri R. Day authored the featured article “Speak No Evil: Legal Ethics v. First Amendment”, 32 *J. Legal Prof.* 161 (2008). It submits that “. . . restoring public perception is crucial to halting the alarming erosion of confidence in the judiciary and to inculcating loyalty to the principle of judicial independence.”⁶⁸ Of course sensible quests for judicial accountability, including debates about when they supersede judicial independence, properly jar a society’s deference to its judiciary. In fact co-panelist Professor Drew Noble Lanier confirms:

While courts are certainly political institutions, they are also legal institutions that differ from the other political branches. Courts operate within a field of bounded discretion due to pre-existing rules that govern their decision-making. These include procedural and evidentiary rules that

⁶⁴ *Id.*

⁶⁵ *Id.* at 1013.

⁶⁶ *See, Id.* at 1014-1026.

⁶⁷ *Id.* at 1028.

⁶⁸ “Speak No Evil: Legal Ethics v. First Amendment”, 32 *J. Legal Prof.* 161 at 163 (2008).

limit how and when courts can act and constrain a court's options when issuing a decision.⁶⁹

Professor Day interjects that “[l]awyers are in the best position to inform the public regarding the positive and negative aspects of the judiciary.”⁷⁰

Much like her featured article, Professor Day’s presentation at the University of Baltimore comprehensively explored “the contours of attorneys’ First Amendment rights”.⁷¹ They are chronicled by the six (6) part article which includes this handy overview:

It should not be surprising that the role of judges engenders controversy and that judicial performance is scrutinized under an intense spotlight. Judges make life and death decisions, determine the substantiality of family relationships, influence the riches of individuals and corporations, change social policy, and even decide presidential elections. In their hands, individuals and communities place responsibility for making life-altering decisions. In reality, judges do not make these decisions alone; indeed, many others influence which issues reach the courts and how those issues are decided. Yet, judges are the identifiable individuals who control the judicial process. From the public's viewpoint, judges are the embodiment of the whole judicial system.

Fears that critical statements and declining respect will weaken the judicial branch of government and, ultimately, spiral into anarchy may be overly dramatic. Nevertheless, the concerns that draw attention to this problem are real and warrant further study concerning how to increase public trust. There is no debate that information and education, or the lack thereof, are both the cause and the solution. Lawyers can and should play a vital role in educating the public about the judicial system.

Subjecting attorneys to disciplinary proceedings for their criticisms of judicial performance is counterproductive; further, it does not correlate to the increase or decrease of public confidence in the judiciary. Courts should review enforcement of the ethical rules that restrict attorney criticism of judges under the highest level of scrutiny. When there are not countervailing fundamental rights, such as a fair and impartial trial, to weigh against the suppression of core political speech, First Amendment rights should triumph over considerations of public perception and civility. Application of these ethical rules under less than exacting scrutiny violates the principles of free and open democracy. American democracy depends upon confidence and trust in the institutions of government and the rule of law, not in the person who happens to occupy the seat of power at any given time. The judiciary is an institution of government, individual judges are not. Judges serve the public through their work in the judicial system. If the First Amendment

⁶⁹ *“Eye of the Hurricane”* at 1030.

⁷⁰ *“Speak No Evil”* at 164.

⁷¹ *Id.* at 163.

stands for nothing else, it stands for the right of a free people to be informed about those officials they entrust to oversee their government. Shielding the public from critical views concerning members of the judiciary, even if such views are expressed in poor taste, is detrimental to the promotion of public trust. Public confidence in government relies upon transparency. Any attempt to silence one point of view from those sources most informed is tantamount to government censorship. Nothing is more dangerous to an independent judiciary than limiting information and silencing disfavored voices.⁷²

Moreover it seems a well-informed public could competently assess whether its judiciary acts within prescribed ethical norms. “(T)he degree to which judges believe they can decide and do decide (such matters) consistent with their own political attitudes, values and conceptions of judicial role (in their interpretation of the law), . . . in opposition to what others, who have or are believed to have political or judicial power, think about or desire in like matters . . .”⁷³ may offend the collective sovereignty of American people.

d. Sufficient Transparency, Awareness, and Education Should Preserve More Than Public Trust in America’s Judiciary –

About thirty (30) years before *Iqbal*, the Seventh Circuit, U.S. Court of Appeals reportedly “... determined that policy objectives . . . would be served by restricting access to the courts for those seeking redress for wrongs allegedly perpetrated by private individuals in concert with immune judges.”⁷⁴ Seventh Circuit Judge Luther Swygert dissented, explaining:

This decision, like all decisions about imposing or not imposing federal statutory liability for types of wrongdoing, should be based on an evaluation of the competing policy interests; the decisionmaker must determine whether it is better or not to offer the federal judicial system as a forum for redress for such alleged wrongs. But this decision is one reserved for Congress, and Congress promulgated section 1983 and approved the Federal Rules of Civil Procedure without the restriction erected by the five concurring judges in this case. Judicial incantation of hypothetical policy ‘horribles’ cannot justify imposition of this restriction on the scope of the statute’s protection.⁷⁵

Attorney Zena Crenshaw-Logal did not extend a similar, “Separation of Powers” analysis to *Iqbal* at Fogg’s debut symposium. Instead she posed a question, published in the *West Virginia Law Review* almost ten (10) years before the gathering: “Does the Constitution mandate a rule of *stare decisis*, or is it simply a judicial policy than can be altered or discarded when the need arises?”⁷⁶ Attorney Thomas Healy wrote the referenced law

⁷² *Id.* at 197-198.

⁷³ *Cf.*, “*Eye of the Hurricane*” at 1031.

⁷⁴ *Sparkman v. McFarlin*, 601 F. 2d 261 at 280 (7th Cir. 1979). (*Swygert, J. dissenting*).

⁷⁵ *Id.* at 280-281. (internal footnote omitted).

⁷⁶ Healy, Thomas. “*Stare Decisis As A Constitutional Requirement*”, 104 *W. Va. L. Rev.* 43 at 44 (Fall, 2001).

review and question and previews his answer which attorney Crenshaw-Logal shared at the University of Baltimore.

Attorney Healy explains:

In Part III, I acknowledge that even if *stare decisis* is not dictated by the (Constitution or expectations of our Founding Fathers) or by the system of checks and balances, it might nonetheless be essential to the legitimacy of the courts. By following the doctrine consistently for the better part of two centuries, the courts may have created an expectation that they will continue to do so. And to the extent that their legitimacy now rides on this expectation, they may no longer be free to abandon the doctrine. Even if this is true, however, it does not necessarily follow that non-precedential decisions threaten the courts' legitimacy. *Stare decisis* is not an end in itself, but a means to promote certain values, such as certainty, equality, efficiency, and judicial integrity. Although a complete abandonment of *stare decisis* might undermine these values, the discrete practice of issuing nonprecedential opinions does not. Because a court must still follow past decisions even when it issues a nonprecedential opinion, problems arise only when the nonprecedential opinion differs in a meaningful way from the precedents upon which it is based (or when it is based on no precedents at all, as in cases of first impression). Therefore, as long as courts adopt a narrow rule for determining when nonprecedential opinions will be issued, along with mechanisms to ensure compliance with that rule, the underlying values of *stare decisis* will be preserved.⁷⁷

About five (5) years after Healy's foregoing words were published, the *South Carolina Law Review* published an article titled "Toward Neutral Principles of *Stare Decisis* in Tort Law"⁷⁸ in which the writers acknowledge "the dynamics in tort law are significantly different from constitutional law".⁷⁹ Attorney Crenshaw-Logal presented their "ten neutral principles of *stare decisis* . . . that affect tort(s)",⁸⁰ explaining to Fogg's audience that the principles ". . .

⁷⁷ *Id.* at 51.

⁷⁸ Schwartz, Victor E., Silverman, Cary and Goldberg, Phil. "Toward Neutral Principles of *Stare Decisis* in Tort Law", 58 *S.C. L. Rev.* 317 (2006).

⁷⁹ *Id.* at 323.

⁸⁰ The first seven are principles of change:

- Principle 1: A significant shift in the legal foundation underlying a rule may warrant a departure from *stare decisis*;
- Principle 2: A tort law rule that is no longer compatible with the realities of modern society may need to shift to meet changing times;
- Principle 3: Changes in the nature of modern tort litigation may require alteration of a tort law rule;
- Principle 4: Advances in science or technology may require extending or invalidating an earlier tort law doctrine;
- Principle 5: Previous decisions that have so chipped away at a tort law rule to render it superfluous may support abandonment of the rule in its entirety;
- Principle 6: Unintended consequences of previous departures from precedent may require revisiting and correcting earlier rulings;

look a lot like the justifications for *Iqbal* that Professor Rachlinski describes in his article we're featuring."

After sharing the principles of *stare decisis* for torts, attorney Crenshaw-Logal asked what she said is a rhetorical question: "(H)ow can 'the core' of America's legal system change based on shifts in perspective among judges when the first seven (7) principles of change in tort law require societal shifts?" She added:

It's difficult enough to reconcile the U.S. Constitution and democracy with a judge's perception of societal shifts as expressed by judicial decision. Some group is sure to think the judge is misreading social trends, trampling constitutional rights as well as democracy, and exhibiting judicial activism.

But when the winds of change only blow among federal judges, prompting a fundamental shift in America's legal system (such as represented by *Iqbal*), in my view our judiciary is acting more like an oligarchy than third branch of government.

Acknowledging that "(a)ny of us can be gratified or horrified by a court's impact on public policy depending on our politics", attorney Crenshaw-Logal proposed that "Professor Lanier's article confirms a reality we should find most troubling; the reality being that "(c)ourts throughout the United States (support certain policies and outcomes while opposing others) on a daily basis without arousing much public interest or controversy."⁸¹

The relative obscurity of American courts was noted in a variety of ways at Fogg's debut symposium on *stare decisis*. The courts were fairly described as obscure based on inadequate major media coverage of their activities; the misunderstandings and misperceptions of their proper function that abound; the disregard of and disinterest in their operations among many Americans; and the nature as well as implications of those activities that are simply unknown by or concealed from most Americans. As Professor Day's featured article concludes, "(t)here is no debate that information and education, or the lack thereof, are both the cause and the solution"⁸² of declining confidence in American

Principle 7: A preference for uniformity and consistency in tort law may favor . . . tort law doctrines that persist in some jurisdictions, despite their near universal abandonment in sister states.

The final three are principles of stability:

Principle 8: Individuals, nonprofit organizations, and businesses may significantly rely on a tort law rule in structuring their affairs and deciding where and how to do business;

Principle 9: Prudential concerns may favor awaiting legislative intervention where the court finds that policymakers are better suited to alter or replace a tort law rule;

Principle 10: Departures from precedent should be incremental and must respect fundamental principles of tort law.

"*Toward Neutral Principles*" at 328.

⁸¹ "*Eye of the Hurricane*" at 1030.

⁸² "*Speak No Evil*" at 197.

courts.⁸³ Attorney Crenshaw-Logal interjected at the University of Baltimore, “(t)his relative anonymity/covertness is what allows American courts a prerogative uncomfortably paralleling an oligarchy at times; (a)nd in that mode, the U.S. Supreme Court moved our country in the opposite direction of *stare decisis*” through *Iqbal*.

e. Where has all the predictability, efficiency, and welfare-enhancement gone?

Attorney Tom Devine and attorney Zena Crenshaw-Logal offered the following anecdotes to suggest the unduly limited power of precedent in America:

- **Attorney Tom Devine –**

- **The Case of Former Federal Air Marshal Robert MacLean:** Mr. MacLean is a former Federal Air Marshal who successfully blew the whistle on plans to cancel Federal Air Marshal coverage during a planned, more ambitious re-run of the 9/11 hijacking by publicly releasing the order to abandon protection, which at the time was not marked with any restrictions on its use. After congressional outrage, the orders were rescinded and the hijacking prevented. Three years after the fact, however, the Transportation Security Administration used internal regulations to mark the orders he disclosed as “Sensitive Security Information” and fired him for breaching national security by interfering with agency management’s control of resources. Ironically, he had interfered with agency management abandoning national security, and may have prevented the most egregious terrorist attack in history despite TSA abandoning its duties. Despite friend of the court briefs from Congress and the U.S. Office of Special Counsel, the Merit Systems Protection Board⁸⁴ held that the agency’s internal secrecy rules overrode Mr. MacLean’s statutory free speech rights under the Whistleblower Protection Act.⁸⁵ The case currently is on appeal to the Federal Circuit Court of Appeals.
- **The Case of Air Force Cost Control Expert John White:** Mr. White blew the whistle on duplicative computer training programs that doubled the cost and undermined the effectiveness of training, because the extra courses were from contractors in the military “old boys network” who were not qualified and contradicted the real training at accredited universities. An independent management review and the Secretary of the Air Force agreed with him and canceled the duplicative programs. But the frustrated local base commander stripped Mr. White of his duties and reassigned him without work to a temporary office in the desert outside Las Vegas, Nevada. Mr. White filed a

⁸³ In addition to public trust, sufficient transparency, awareness, and education with regard to America’s judiciary should help preserve the country’s execution of democracy and functioning as a republic through three (3) branches of government; its corresponding separation of powers; and its commitment to the rule of law.

⁸⁴ Amicus curiae brief of Representatives Maloney and Kucinich, *MacLean v. U.S. Department of Homeland Security*, MSPB No. SF-0752006-0611-I-2 (April 12, 2012); and amicus curiae brief of the U.S. Office of Special Counsel, *id.*, (August 25, 2011).

⁸⁵ *MacLean v. U.S. Department of Homeland Security*, 2011 MSPB 70 (2011).

Whistleblower Protection Act appeal and won at the Merit Systems Protection Board. The Federal Circuit overturned his victory, however, by ruling that he did not have a “reasonable belief” for his concerns, despite the agency leadership agreeing he was right. The court came to this conclusion by ruling that to have a reasonable belief a whistleblower must first overcome the presumption that the government acts “correctly, fairly, lawfully and in good faith” by irrefragable proof.”⁸⁶ That is the highest burden in the legal system, and only can be met if the evidence is “uncontestable, undeniable, irrefutable or incapable of being overthrown.” Since this 1999 precedent, it has been virtually impossible for whistleblowers to prove they are entitled to protection against retaliation. It is the cornerstone of efforts to restore legitimate government whistleblower rights through pending legislation, the Whistleblower Protection Enhancement Act.⁸⁷

- **Examples of “Creative Sophism” by the Federal Circuit Court of Appeals:** The Federal Circuit has not only set up an irrefragable proof standard. It has translated protection for “any” lawful disclosure to mean “almost nothing.” To illustrate, the court has ruled that “any” does not include disclosures connected with carrying out job duties, or anything at all if someone has disclosed the misconduct previously. None of these loopholes has any statutory basis, and again in pending Whistleblower Protection Enhancement Act legislation Congress is expected to cancel them all by statute.⁸⁸ This will follow 1989 and 1994 actions to restore unequivocal statutory free speech rights erased by the Federal Circuit on grounds other than constitutionality.

- **Attorney Zena Crenshaw-Logal –**

- **The Case of Ziad Akl, M.D.:** Trial and appellate courts are grappling with *Iqbal* without a landmark clarification from the U.S. Supreme Court like they got in 2005 on the Rooker-Feldman Doctrine. Rooker-Feldman derives its name from two U. S. Supreme Court cases decided in 1923 and 1983: *Rooker v. Fidelity Trust* (1923) and *District of Columbia Court of Appeals v. Feldman* (1983).

In 2005, the U.S. Supreme Court confirmed that the Rooker-Feldman doctrine is “confined to cases of the kind from which the doctrine acquired its name: cases brought by state court losers complaining of injuries caused by state court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.” *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U S 280 (2005).

⁸⁶ *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999).

⁸⁷ *S. Rep. 111-101 to Accompany S. 372*, at 7-10 (111th Cong., 2nd Sess. 2011)

⁸⁸ *Id.*, at 3-7 and cases cited therein.

Dr. Ziad Akl⁸⁹ was removed from the staff of a hospital in Virginia. He sued in Virginia state court for malicious termination of his appointment to the medical staff, and his suit was dismissed. In 2006, Dr. Akl sued four (4) defendants in federal district court: the judge and his clerk for deprivation of due process and violation of civil rights under color of law; and two opposing attorneys for conspiracy to violate civil rights. The lawsuit included state tort claims.

It seems Dr. Akl lost in federal court, at least in part due to misapplication of Rooker Feldman. That's an all too familiar outcome for federal court plaintiffs alleging a state court conspiracy between their presiding judge and opponent as well as opposing counsel. It's the underlying conspiracy that violates federal rights; not simply a failure to win in state court. Federal courts repeatedly miss this distinction and have done so since the Rooker-Feldman Doctrine emerged.

- **A Privacy Rights Case Impacting Grassroots, Criminal Justice System Watchdogs:** Earlier this year, I filed a federal lawsuit challenging the ability of a West Texas police department to seize the computer(s) and files of advocates monitoring the department by alleging the files are mixed with child pornography. Criminal charges were never filed and, as far as I'm aware, the probable cause for searching one of my advisory board members was never disclosed. Yet in searching him, the police seized serious complaints against some of them made by confidential informants. The board member maintained records for our criminal justice system watchdog activities which were well-known locally.

My federal case involved novel First Amendment issues including but not limited to questions about the standing and privacy rights of innocent people interacting with someone accused of a crime. I was the named plaintiff for a variety of practical reasons. So the case was *Zena Crenshaw-Logal vs. The City of Abilene, Texas*.⁹⁰ It was promptly dismissed and on appeal, the 5th Circuit Court of Appeals quoted five (5) isolated words or phrases from the record to equate my case with a U.S. Supreme Court decision that arguably justified dismissing my case. In a petition for rehearing, I explained to the appellate court that "virtually all the operative facts and circumstances on which (the) appeal (was) resolved are hypothecated". In other words, the court based its decision on a fictional or non-existent case and controversy.

If you're my age or older you may remember a T.V. detective show that began with the statement, "names and dates have been changed to protect the

⁸⁹ Dr. Akl appeared at Fogg's debut symposium and made a presentation to the audience about his referenced case, in addition to the foregoing comments of attorney Crenshaw-Logal.

⁹⁰ Appeal No. 11-10264 before the United States Court of Appeals for the Fifth Circuit at New Orleans, Louisiana. Disposition of the appeal is reported at *Crenshaw-Logal*, 2011 WL 3363872, complete with an inaccurate report of Crenshaw-Logal's attorney bar status which she disputed, to no avail, in her referenced petition for rehearing.

innocent”. Well in my appeal, the names and dates stayed the same; but the facts got changed to a set of facts and circumstances that justified me losing.

On the bright side I have a word count to establish the court’s sparse reliance on the record. Judicial decisions based on scant quotes or extensive paraphrasing more likely reflect a misstated, distorted, and/or hypothecated version of underlying cases than rulings backed by a hearty dose of verbatim quotes. These non-existent cases and controversies plucked from actual cases and controversies, may line up with precedent. But they don’t line up with reality and turn legal proceedings into meaningless rituals for many who could hardly afford a lawsuit and appeal in the first place.

- **The Case of Mr. Robert Motta:** NFOJA member Robert Motta had a divorce case decided against him in the Circuit Court of Will County, Illinois by a judge Mr. Motta claimed had a romantic relationship with his ex-wife. Mr. Motta challenged this divorce on grounds that he had an earlier divorce case pending, citing law to establish the vested jurisdiction of another Will County judge. Mr. Motta’s defense also included what seems to be an uncontested affidavit that should have deprived the second judge of jurisdiction based on inadequate service of process. Yet Mr. Motta did not prevail on any point of law. He filed related disciplinary charges, but never got a response as far as I have been able to determine.

Obviously the propriety or impropriety of the foregoing assertions, allegations, and outcomes, cannot be conclusively established through the Fogg symposia. Absolutely clear from Fogg’s debut symposium is the anguish corresponding anecdotes reflect among impacted claimants and litigants as well as their lawyers and nonprofit advocates. Professor Day proposed at the University of Baltimore that “Restorative Justice” could mitigate that distress. Pursuant to the concept, which is applied in multiple contexts, aggrieved and disgruntled claimants and litigants would have some form of summit with jurists who did not preside over matters considered. The goal is to move all sides of the dialogue to appropriate concessions and the healing that hopefully results.

f. The Arguable Elusiveness of Judicial Accountability –

Attorney Crenshaw-Logal made a concession about the impact of *Iqbal*, only to introduce another concern:

We’re approaching *Iqbal*’s third (3rd) year anniversary, and I’ve detected less alarm about the case than I perceived a year ago. Apparently the faith in institutional actors that *Iqbal* arguably reflects has not produced the courthouse boom for defendants that many feared would take place.

So what is the law of the land – cases with fair outcomes despite inequities *Iqbal* could have created . . . or *Iqbal*? Is the law of the land *Iqbal* or *Iqbal* as it has been applied?

Can we file lawsuits and survive motions to dismiss based on reasonable decisions that scale back *Iqbal* or does *Iqbal* introduce new pleading dynamics from judge to judge, case to case?

I suggest we can't rely on *stare decisis* or the rule of law to answer these questions because America's judiciary is not adequately insulated from other considerations.

While Professor Johnson appropriately lauds "the ethical standards that prevent or mitigate harm to the exercise of judicial judgment by inappropriate pressures . . .", attorney Crenshaw-Logal called it ironic ". . . that judges are most buffered from the consequences of disregarding or circumventing ethical norms".

To challenge the general accountability of judges, attorney Crenshaw-Logal explained to Fogg's symposium audience that . . .

Judges limit and have limited their own accountability through rules and case law. Judges created judicial immunity from civil lawsuits which keeps us from suing them in most instances. I'm not against there being limits on our ability to sue judges for what they do on the bench; but I believe that immunity should have been created by legislators – not the judges themselves – and that immunity from civil suit shouldn't be coupled with a *de facto* immunity from discipline, impeachment, and criminal prosecution; all of which judges have.

I'd be remiss not to mention the "merits of the case exception" which precludes an ethics or disability charge against a judge that "directly relate(s) to the merits of a decision or procedural ruling". So a judge could be bribed or experiencing dementia and as a result make unfair, erroneous, even outright ridiculous rulings but those rulings cannot be evidence that the judge is unfit in any way. Again, another judge-created limit on judicial accountability.

Professor Lara Bazelon joins us next Spring, but if you advance registered for our symposium you've been provided a link to her featured article⁹¹ which is an excellent glimpse of how far judges have gone to disregard even shockingly bad behavior by their colleagues, both on and off the bench.

Rather than unethical judges, attorney Crenshaw-Logal cited inadequate transparency, awareness, and education regarding American courts as a main culprit, stating: "I'd like to propose that at some point America's legal system began operating in such obscurity that "judicial restraint" became our only hope; I propose that judicial restraint explains America's seeming reliance on the rule of law more than *stare decisis* or any self-executing, external constraint."

⁹¹ Bazelon, Lara A. "Putting the Mice in Charge of the Cheese: Why Federal Judges Cannot Always Be Trusted to Police Themselves and What Congress Can Do About It", 97 *Ky. Law J.* 439 (2008-2009).

g. Minimizing the Most Significant Threats to *Stare Decisis* and its Role in Promoting the Rule of Law in America –

Though the phrase is widely used, the rule of law is "an exceedingly elusive notion".⁹² Professor Brian Z. Tamanaha of St. John University School of Law explains that ". . . everyone is for it but have contrasting convictions about what it is."⁹³ Perhaps all would concede that the rule of law is not the rule of law when judges enforce or disregard precedent at will. Professor Vincent R. Johnson substantially identified the solution in defining the four (4) most significant threats to *stare decisis*.

Professor Johnson would have us (1). choose and/or retain well-educated, intelligent, honest judges; (2). adequately fund America's judiciary so it is prompt, efficient, and pays competitive judicial salaries; (3). adequately educate both the general public and judges on matters essential to the proper functioning of America's judiciary; and (4). minimize the blurring of law and partisan politics. At Fogg's debut symposium, Professor Terri R. Day stressed the importance of civics education in helping aggrieved and disgruntled litigants identify the shortcoming(s) in one or more of these areas, fueling their discontent with one or more judges. Relevant public awareness can also be accomplished, at least in part, through major media and alternative publicity outlets.

Attorney Zena Crenshaw-Logal insists that . . .

(t)o restore the rule of law, there must be adequate mechanisms for bringing societal pressures to bear by majorities and minorities, whether weak or powerful, so American judges would be wise to reasonably factor all relevant perspectives in judicial decision-making.

Time constraints prevented attorney Crenshaw-Logal from presenting at the University of Baltimore, the following ideas and remarks about judicial reform, extracted from her presentation notes:

- **"Citizens' Panel On Judicial Misconduct Act":** NFOJA is a legislative initiative to vest randomly selected, trained, and rotating panels of private citizens with responsibility for state judicial disciplinary processes. NFOJA is based on the premise that '(r)estoring the Rule of Law when breached is an obligation of and should directly involve all Americans. Moreover, there is an imbalance of power between judges as a group and "We The People" when judges are essentially final arbiters of their compliance with ethical norms or lack thereof.

NFOJA promotes model legislation entitled the 'Citizens' Panel On Judicial Misconduct Act' and have a simple training system so NFOJA members can host community forums on judicial accountability that introduce our proposed legislation, recruit volunteers, fundraise, and build towards a successful ballot initiative and/or lobbying of state legislators. NFOJA emphasizes the difference

⁹² Tamanaha, Brian Z. (2004). *On the Rule of Law*. Cambridge University Press. p. 3.

⁹³ *Id.*

between scrutinizing judicial decisions and judicial conduct in light of prescribed ethical standards.

- **I.G. for the Federal Courts:** A Professor Ronald Rotunda⁹⁴ as well as some members of Congress have proposed an Inspector General for the federal courts. I'm not necessarily against that idea, but I believe the only gateway for bringing societal pressures to bear on a government institution should not be an institutional actor.
- **Scholarly Review of U.S. Supreme Court Certiorari Denials:** Some colleagues of mine and I are pondering a program by which all petitions for certiorari rejected by the U.S. Supreme Court would be systematically distributed to law schools for consideration by law students. The participating students would address the "cert-worthiness" of rejected cases, much like a school law review publication operates. In the process, conflicts, enforcement, and public policy gaps in federal law could be addressed.
- **Federal, Judicial Whistleblower Protection and Nationalized Regulation of Lawyer Speech:** As a global coalition against corruption, Transparency International (TI) submits "(i)t is . . . crucial that the transparency of the judiciary be continuously scrutinized, and when found to be lacking, enforced with particular momentum in order to prevent the weakest sections of the society to bear the costs of corruption in the judicial system." After acknowledging that, among others, "(i)t is often courageous members of the . . . judicial system itself who speak out against specific instances of corruption", TI proposes that such action be encouraged through development of "confidential and rigorous formal complaints procedure". Missing from the coalition's key recommendations are direct measures to protect and/or help vindicate as needed, Doctors of Jurisprudence, licensed attorneys, and judges whom authorities have identified as judicial whistleblowers.⁹⁵

In 2005, NFOJA and POPULAR's corporate sponsor⁹⁶ proposed federal judicial whistleblower protection and dubbed the model legislation, "The Weinstock Act". POPULAR subsequently adopted the language of that proposed Act and made it part of a white paper, "Protecting Judicial Whistleblowers in the War on Poverty"⁹⁷, as well as the group's quest for exclusive, national regulation of lawyers' speech. NFOJA later joined POPULAR's quest for federal judicial whistleblower protection.

Section V. of Professor Day's featured article is titled "Strategies to Improve Public Perception Unrelated to Speech Suppression".⁹⁸ It extends this suggestion which may be fairly characterized as an important, proposed, judicial reform strategy:⁹⁹

⁹⁴ See, Rotunda, Ronald. "Judicial Transparency, Judicial Ethics, and a Judicial Solution: An Inspector General for the Federal Courts", 41 *Loyola Univ. of Chicago L. J.* 301 (2009)

⁹⁵ See, Transparency International's 2007 "Global Corruption Report on the Judiciary".

⁹⁶ National Judicial Conduct and Disability Law Project, Inc. @ www.njcdlp.org

⁹⁷ Accessible at <http://tiny.cc/kr5fl>

⁹⁸ "Speak No Evil" at 194.

Court information officers can play an important role in public education. As judges are prohibited from speaking about pending cases, court information officers may contribute the "voice" of the judiciary to public debate about cases and legal proceedings. Court information officers can counteract media spin on high profile cases and can respond to inaccurate reporting regarding the role of the court and judges. At least forty states have some form of public relations or court information officer. The federal courts also employ a few court information officers through the Administrative Office of the U.S. Courts. The Administrative Office, additionally, has a dedicated newsroom site and an online newsletter. As the public relies more on information from the Internet, where information is abundant and accuracy is difficult to ascertain, it is imperative that the judiciary, through court information officers, counteract misinformation and contribute to the overall pool of information necessary to educate the public.¹⁰⁰

Anticipated panelist, Professor Lara Bazelon, writes that "(t)o remedy the problem of institutional bias, Congress must rewrite the Act to make the proceedings transparent, afford complainants the same rights as judges, provide for out-of-circuit transfers in high-profile cases where the home circuit's impartiality might be questioned, and provide for mandatory sanctions for specific misdeeds."¹⁰¹ The "Act" that Professor Bazelon references is "the Judicial Conduct and Disability Act of 1980 . . . which vested (federal) judges with the exclusive authority to discipline poor behavior within their ranks, which, while problematic, did not rise to the level of an impeachable offense"¹⁰², now the "Judicial Improvements Act", Title 28 U.S.C. §351 *et seq.*

VI.

Conclusion: Information Gaps and Un-reconciled Conflicts To Date:

Fogg's debut symposium provides one glimpse of core subjects brought to bear in assessing the vitality of *stare decisis* in America given prescribed factors. Scholars may expand upon and/or take issue with the articles featured by past, current, and/or future symposia as well as their application during the program series. Hopefully contributions will be forthcoming from panelists with comprehensive research and published writing(s) on *stare decisis*, the rule of law in America, Amendment X of the U.S. Constitution, the judicial selection/election debate, judicial independence, judicial accountability, judicial reform, and/or the intersection of law, media, and politics. Of course, all involved are welcome to support, refute, and/or debate the reported contentions of attorney Tom Devine, Professor Kylar W. Broadus, and attorney Zena Crenshaw-Logal.¹⁰³

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⁹⁹ Though Professor Day characterizes the suggestion as a way of improving public perception, some people may consider it an important, proposed, judicial reform strategy.

¹⁰⁰ *"Speak No Evil" at 196-197.*

¹⁰¹ *"Putting the Mice in Charge of the Cheese" at 503.*

¹⁰² *Id. at 441.*

¹⁰³ For updates, visit www.matthewfoggevent.com

