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Dissolving Legal Barriers

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I.

Trial judges and appellate justices rarely interact across their courts. Judges and lawyers have sporadic, desultory contact at e.g., Inns of Court and bench-bar conferences (17, 907 lawyers practice in San Francisco;[1] maybe 80 attend the annual bench-bar conference), and there's little communication between law schools and practitioners.

Except in the most formal way—through briefs, opinions and orders, and the rare helpful law review article—no one is talking to anyone else. Yet we're all engaged in the same effort: to deliver fair and efficient legal services to the parties in our courts.

We're not learning from each other. Let's change that.

Judge Posner, erstwhile of the Seventh Circuit, routinely used to sit as a district court judge.[2] Our justices -- from the Supreme or at least the appellate courts—can do the same.[3] I assure them of an eye opening adventure. (And wouldn't it be fun to read an appellate opinion reversing a supreme court justice sitting as a trial judge?) We have been treated to a supreme court made of brand new trial judges in *Mallano v. Chiang* (review denied Oct. 26, 2018), but that's a once-in-a-lifetime event. The courts of appeal already take trial judges as pro tems, but it's done only rarely to fill temporary vacancies, and as a sort of treat. They could do this more routinely, providing a broad look into the appellate process for trial judges. Some lawyers act as pro tem judges—I did, for many years, and learned a lot about what works and what doesn't in the courtroom. In San Francisco we have successfully used lawyers as pro tem judges to handle discovery motions, small claims cases, and other work. But few lawyers opt for this, and far more should: the work is terrific fun, is good public service, and should be a routine for litigators.

A significant barrier is that between law schools on the one hand and judges and lawyers on the other. We need more lawyers and judges teaching and more law students helping out in the courts.

Chief Justice John Roberts famously noted the often useless contributions of law reviews: "Pick up a copy of any law review that you see, and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th Century Bulgaria, or something."[4] (There isn't any

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[1] This is the number of active lawyers. <https://members.calbar.ca.gov/search/demographics_counties.aspx>

[2] E.g., Jordan T. Smith, "Richard A. Posner, Circuit Judge, Sitting By Designation in the District Courts," 30 REGENT U.L.REV. 259 (2017-18). His trial court opinions include, e.g., *Johansen v. GVN Michigan, Inc*., No. 15 C 912, 2016 WL 9185323 (N.D. Ill. Apr. 27, 2016); *Price v. Highland Cmty. Bank*, 722 F. Supp. 454, 456 (N.D. Ill. 1989), *aff'd*, 932 F.2d 601 (7th Cir. 1991); *BRK Brands, Inc. v. Nest Labs, Inc.,* 28 F. Supp. 3d 765 (N.D. Ill. 2014).

[3] California Constitution, Art. VI § 6 (e) ("The Chief Justice may provide for the assignment of any judge to another court but only with the judge's consent if the court is of lower jurisdiction").

[4] Chief Justice Roberts was answering questions from the audience at the Fourth Circuit's annual judicial conference. <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/25/final-version-of-the-influence-of-immanuel-kant-and-what-the-chief-really-said/>. Leah M. Christensen, "Navigating the Law Review Article Selection Process: An Empirical Study of Those With All the Power—Student Editors, 59 SOUTH CAROLINA LAW REVIEW 465 (2008).

such influence, in case you're wondering. See Orin Kerr's entertaining article at http://www.greenbag.org/v18n3/v18n3_articles_Kerr.pdf.[5]) Aside from contributions to e.g., the ALI's *Restatements of the Law,* law school professors--many of whom have a superb overall sense of legal developments--remain bricked up in their towers. They write at each other, but not to us in the courts where the law develops. Contributing to the disjunction between academia and the practicing profession, few professors have *any* practical experience at all.[6] Despite my eternal debt of gratitude to journals which have published my articles, I note that the people who edit law reviews are those least likely to have the requisite judgment—law students. No other profession turns their scholarship over to the novices. There are few journals devoted to practitioners and edited by them (The *Green Bag*[7] comes to mind), and fewer still that encourage contributions from disciplines such as the natural sciences, economics, statistics, psychology, linguistics, and computer science. These disciplines have a lot to teach lawyers and judges, and heaven knows we need the instruction. Courts use statistics, allow experts to testify on what we think are scientifically valid opinions, opine on what is reasonable economic behavior, and construe language—all based on the briefs of lawyers who may know little more than what judges could guess. Perhaps lack of knowledge of these extra-law fields is tolerable at the trial level where only the parties are affected, but this blinkered approach presents a serious problem at the appellate level.

We need a new law journal. Let's have a board of professors, lawyers and judges pick the articles–the main test is whether an item is useful to the practice of law—and have law students as editors. The senior folks exercise the judgment in selection and the editor students work with experienced lawyers, judges and professors (it's called networking). Perhaps we'll dub it the *REAL Law Journal*.

The divide among members of the legal profession is grim, because no one works well in a silo. Understanding comes from seeing one's work from a different perspective. Working across the legal lines also helps remind us of our real goal: not the interests specific to lawyers, judges, professors, or law schools, but rather the interest of the public which we serve and in the name of which laws are made.

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[5] Orin S. Kerr, "The Influence Of Immanuel Kant On Evidentiary Approaches In 18th-Century Bulgaria," 18 GREEN BAG 2D 251 (2015).

[6] The American Association of Law School did a study some years ago. Concerning new fulltime, tenure-track law professors (which excluded the vast majority of clinicians and legal writing faculty) hired between 1996 through 2000 showed that for those with prior legal practice experience [86.6% of all new hires], "the average number of years' experience was 3.7. . . . There is a negative relationship between the number of years in practice and the [ranking] of the hiring law school [with the new hires at the top twenty-five law schools having only 1.4 years of prior practical experience]." Brent E. Newton, "Preaching What They Don't Practice: Why Law Faculties' Preoccupation With Impractical Scholarship And Devaluation Of Practical Competencies Obstruct Reform In The Legal Academy" SOUTH CAROLINA LAW REVIEW (July 22, 2010), <https://ssrn.com/abstract=1706051>. The study of hiring at top-tier law schools since 2000 found that the median amount of practical experience was one year, and that nearly half of faculty members had never practiced law for a single day. If medical schools took the same approach, they'd be filled with professors who had never set foot in a hospital. <http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html> http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/20110201_comment_general_brent_newton.authcheckdam.pdf. I have previously described some of the history of legal education which led to the widespread prejudice against practicality. Curtis Karnow, "Prejudices of the Past and the Role of Experiential Learning," LITIGATION IN PRACTICE (2017).

[7] Most of its contents are free. <http://www.greenbag.org/archive/green_bag_tables_of_contents.html>

And that leads me to a divide more serious than those noted so far: that between us in the legal profession, and the public. Few understand the legal system, and the result is deeply corrosive. That's a topic for the next in this two part series, to be published tomorrow.

II.

In the first part of this series I urged dissolving barriers among members of the legal profession. A central goal is to avoid mistaking the concerns of our own insular group—those of appellate or trial judges, or those of lawyers, or of professors—for the central interests of the legal system as a whole.

Here, I note a far more serious and corrosive divide: that between the profession and the public it is designed to serve.

We know this problem. Civics education is cursory. A 2016 study suggests 23% of eighth-graders were proficient or better in civics. The Annenberg Public Policy Center found that only 32% of respondents could name the three branches of government.[8] (It's getting worse: the number was 38% in 2011.) Thirty-seven percent can't name any of the rights guaranteed by the First Amendment. The 2015 Annenberg survey found 12% of Americans thought that the Bill of Rights included the right to own a pet.[9] Judges including California Chief Justice Tani G. Cantil-Sakauye, former U.S. Supreme Court Justice Sandra Day O'Connor, and others have worked hard to respond to these deficiencies.[10]

During my 2018 re-election campaign my judicial colleagues and I faced a general lack of understanding of what judges do. Speaking to the public (not lawyers), we were met with incomprehension and suspicion when we wouldn't make promises about types of cases, or align ourselves with political stances. After all, we were running for office, were we not? Were we pro or anti tenant? Pro or anti-development? Our promises to be fair and neutral were often seen as weak evasions. Statements that we would follow the law were sometimes taken as abdication of responsibility to "do the right thing". It was pretty tough to explain, in the 2 minute sound bites we were allowed at most events, the notion and value of an independent judiciary. If in the words of Justice Holmes the First Amendment is about "freedom for the thought that we hate,"[11] then an independent judiciary means tolerating decisions that one detests. But what our various audiences really wanted to hear was that we'd favor their specific interests.[12]

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[8] "Civics Knowledge Predicts Willingness to Protect Supreme Court," September 13, 2018 <https://www.annenbergpublicpolicycenter.org/civics-knowledge-survey-willingness-protect-supreme-court/>

[9] <http://harvardpolitics.com/culture/civic-illiteracy-in-america/>. A 2011 Newsweek survey (of unknown validity) found 70 % of Americans didn't know the Constitution is the supreme law of the land. Devin Dwyer, "United States of Ignorants [sic]? Americans Don't Know Constitution, Surveys Find" (March 24, 2011), <https://abcnews.go.com/Politics/tea-party-enthusiasm-surveys-find-ignorance-us-constitution/story?id=13206667>

[10] See e.g. Chief Justice Tani Cantil-Sakauye's work with her *Power of Democracy* group, <http://www.powerofdemocracy.org/>, <https://www.courts.ca.gov/20902.htm>, and Justice O'Connor's work, <https://www.icivics.org/>

[11] *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J,. dissenting), overruled in part by *Girouard v. United States,* 328 U.S. 61 (1946). The phrase gave rise to the title of a wonderful book on the First Amendment by Anthony Lewis, since passed away, FREEDOM FOR THE THOUGHT THAT WE HATE: A BIOGRAPHY OF THE FIRST AMENDMENT (2007).

[12] Some of these partisan pressures, and others, are discussed in many reports and studies. See e.g., Alica Bannon, "Rethinking Judicial Selection in State Courts," Brennan Center For Justice (June 6, 2016) <https://www.brennancenter.org/publication/rethinking-judicial-selection-state-courts>

The media has an uneven record. Traditional outlets such as newspapers have seen massive cuts over the last few decades,[13] and the few journalists who are left often don't have the time to specialize in the courts.

The power of the courts, and the integrity of judicial system, depend on public endorsement. That's hard without a better understanding of what judges do, their powers and constraints. We know this. But the fault is not just that of the educational system, or the media, or the end of literacy (if it is ending). It's our fault too.

Those of us in the legal profession bear some responsibility for the gap between our appreciation of our legal system and the more general public understanding.

Lawyers need to speak up. All the time. And not just for results they like. Defense counsel can explain why and how a trial sometimes results in guilty verdicts, and prosecutors can do the same with acquittals. Lawyers experienced in class actions can talk about the criteria for certification and the sometimes difficult analyses required. Courts don't need support for popular decisions; they need support for unpopular ones. Lawyers can comment on blogs, send in letters to editors, and be available to the media for comment in a way that judges cannot. Litigators translate legal doctrine to juries: They can do this outside the courtroom, too.

Courts need better public relations. The canons of judicial ethics constrain what they can say. But the word needs to get out. During my re-election campaign last year, I found that virtually no one knew of the collaborative courts and other innovations my court had undertaken. The courts of review release important opinions without comment (more on that below). In the past, some courts have conducted a media "boot camp," offering tours of their courts, meeting with judges, and providing explanations of what the various departments do; courts might experiment with this. Few in the public are aware of the efforts by those on the Judicial Council, and many others, on subjects such as bail, rules reform, legislative initiatives, ethics, collaborative courts, how to deal with victims of human trafficking, better jury instructions, and so on.

And lest anyone doubt that the legal profession is implicated in its separation from the public, one need only read a random appellate opinion to a non-lawyer friend. While some judges take care to write in plain English-- at least enough for a lay reader to get the gist of the point-- it's rare. Generations of lawyers and judges have incrementally elaborated legal lingo. Like a weird species of finch in the Galapagos islands, law language has evolved to its environment, but disconnected from a wider audience. Terms ordinary to us are a puzzle to the public: in a course I designed for pro tem judges dealing with self-represented litigants, I note words like these, impenetrable to laypeople: *pro per, submitted, filed, admissible [evidence], sustained, over-ruled, cross examination, rebuttal, caption [of pleading], pleading*… and so on.

Lawyers and judges employ legal fictions which are oxymorons, such as corporate 'persons,' and legislative 'intent'.[14] Our departures from common usage are flagged by words such as "deemed," "implied," and "constructive," all of which usually signal that we mean the opposite: e.g., *deemed* notice is where the recipient *didn't get* the notice.

All these widen the gulf between our profession and the public.

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[13] E.g., Jill Lapore, "Does Journalism Have A Future?," *The New Yorker* (January 28, 2019) ("Between 1970 and 2016, the year the American Society of News Editors quit counting, five hundred or so dailies went out of business; the rest cut news coverage, or shrank the paper's size, or stopped producing a print edition, or did all of that, and it still wasn't enough. …. And the bleeding hasn't stopped. Between January, 2017, and April, 2018, a third of the nation's largest newspapers, including the Denver Post and the San Jose Mercury News, reported layoffs.") See also, e.g., Josh Gerstein, "Have the Media Stopped Covering Courts?" (November 1, 2012) <https://thecrimereport.org/2012/11/01/2012-11-has-the-media-stopped-covering-courts/>

[14] Kenneth A. Shepsle, "Congress Is A 'They,' Not an 'It': Legislative Intent As Oxymoron," 12 INT'L REV. L. & ECON. 239 (1992); Peter J. Smith, "New Legal Fictions," 95 Geo. L.J. 1435, 1462 (2007).

So: what to do.

We could explain rulings in plain English. I've tried adding a 'plain English summary' in a few of my higher profile case orders: but it's hard. It is one thing to explain the weighing of factors for a preliminary injunction, but it's tough to briefly explain complex statutory analyses, or how, e.g., reverse veil piercing does or does not help in adding a judgment debtor.[15] Illinois does a nice job with straightforward summaries of its supreme court decisions,[16] and Massachusetts links its oral arguments to brief synopses of the issue before its Supreme Judicial Court.[17] The U.S. Supreme Court's Office of Public Information provides summaries.[18]

These are efforts worthy of emulation, but don't do much to address the underlying problem. That problem is the irreducible complexity of the law. And in our lifetimes, at least, the problem will get worse, not better.

So we need translators; intermediaries. We rely on lawyers for that work; we rely on them every day, in every courtroom.

The great divide between the public and the legal system is founded on the opacity of the legal system, experienced most acutely by those who can't afford a lawyer. People who represent themselves in anything other than the simplest cases are in deep trouble, and they know it: For them the legal system is a truly an alien world, and for some, a world of fear and loathing. Repairing the divide between the legal system and the public requires providing counsel to those who can't afford it. This is one of the most important challenges in our civil justice system.[19] Solving it will help bring the legal professions closer to—and earn the trust of—the public we serve.

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[15] *Curci Investments, LLC v. Baldwin*, 14 Cal. App. 5th 214 (2017).

[16] E.g., <http://www.illinoiscourts.gov/Opinions/SupremeCourt/2011/July/Summaries/111903s>.

[17] <http://www2.suffolk.edu/sjc/summaries/summaries09062011.html.> The California Supreme Court has weekly case summaries, but usually these just list the question certified for review, not resulting opinions <https://www.courts.ca.gov/3012.htm>. For a review of these and other states' practices, see <https://www.ncsc.org/services-and-experts/areas-of-expertise/technology/web-best-practices/case-summaries-and-high-profile-cases.aspx>

[18] The summaries are good, but some more opaque than others. Anyone without patent experience would have a hard time with the summary of e.g., *Helsinn Healthcare S. A. V. Teva Pharmaceuticals USA*, No. 17–1229, January 22, 2019 ("A commercial sale to a third party who is required to keep the invention confidential may place the invention "on sale" under §102(a). The patent statute in force immediately before the AIA included an on-sale bar. This Court's precedent interpreting that provision supports the view that a sale or offer of sale need not make an invention available to the public to constitute invalidating prior art. See, e.g., Pfaff v. Wells Electronics, Inc., 525 U. S. 55, 67. The Federal Circuit had made explicit what was implicit in this Court's pre-AIA precedent, holding that "secret sales" could invalidate a patent. Special Devices, Inc. v. OEA, Inc., 270 F. 3d 1353, 1357. Given this settled pre-AIA precedent, the Court applies the presumption that when Congress reenacted the same "on sale" language in the AIA, it adopted the earlier judicial construction of that phrase. The addition of the catchall phrase "or otherwise available to the public" is not enough of a change for the Court to conclude that Congress intended to alter the meaning of "on sale." Paroline v. United States, 572 U. S. 434, and Federal Maritime Comm'n v. Seatrain Lines, Inc., 411 U. S. 726, distinguished."). And there are good summaries at for example <https://www.scotusblog.com/> and <https://www.oyez.org/>.

[19] Pro bono work has been the backstop here for generations, but those efforts, even redoubled, won't fix the problem. California and other states are currently experimenting with "civil Gideon," i.e., funding counsel for the indigent. (Much of what we used to call the middle class needs free lawyers too.) In 2009, the legislature passed AB 590 which authorized a pilot program. Gov. C. § 68650 et seq. Toby Rothschild, "The Shriver Act Advances the Cause of Civil Gideon," *Los Angeles Lawyer* 12 (March 2018). A 2017 Judicial Council report is found at https://www.courts.ca.gov/documents/Shriver-Probate-2017.pdf. San Francisco passed Proposition F to provide counsel to those facing eviction. Laura Ernde, "Groundbreaking San Francisco Measure Guarantees Counsel to Tenants Facing Eviction," *San Francisco Attorney* (SF Bar: Fall 2018).