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Keynote Address

CREATIVE LAWYERING

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Why should we aspire to take a creative approach to our practice of law? That is an important question, a question that can and should hover over and animate all aspects of our professional lives. The answer seems, in some ways, obvious and self-evident. Creativity is a good thing, so the more of it, the better, right? But it is not quite so simple; it is a bit more complex. "Why should we aspire to be more creative in practicing law?" is an abstract question perhaps best answered, at least initially, by a concrete example.

A COMIC STRIP BRIEF

The shining example of creative lawyering I have in mind is in the Appendix. It is an actual brief filed in federal court in Manhattan in 2012. The case was a civil antitrust action brought by the U.S. Justice Department against the book publishing industry for alleged price-fixing of e-books. After the parties reached a tentative settlement, the trial judge allowed non-parties to comment on the proposed settlement, but, taking the word "brief" literally, limited the length of their submissions to only five pages. Five pages are not much space, especially in a complex antitrust case.

The brief in the Appendix is what one lawyer filed to comply with the stringent court-ordered page limit. Take a few moments to look at it and see what he did. Instead of the usual, familiar format of a legal brief, the lawyer submitted something new and different and stunningly effective: a brief in the form

of a comic strip. He innovated. With great compression, efficiency, and clarity, coupled with an unexpected but pleasing presentation, the brief immediately catches one's attention and forcefully drives home its argument. His comic strip brief works.

It more than works. It is a remarkable, memorable achievement, a wonderful display of imaginative and creative lawyering. It complies with the court-imposed page limit by using economy of expression in a medium startlingly new for a legal brief. It makes its points with flair and a light touch in a way that is unforgettable. It simplifies the issues and, with a minimum of legal jargon, maximizes its persuasive power. It even makes the reader smile, not a common occurrence when perusing legal briefs. It is extraordinary and amazing, even brilliant.

Like me, you will be astonished by it, will admire it, and will surely show it to other lawyers, including those in your own firm, as an example of what lawyering at its best and most creative can be.

But exactly what is it that makes this brilliant comic strip brief work so well? Its success is not simply the cliché about a picture being worth a thousand words. It is something more. Why is it so successful? The real answer is imagination and creativity in the practice of law. This comic strip brief is

both fresh and effective. It surprises us, but in a good way. We look at it once and wonder, "What was he thinking?" We look at it again and say to ourselves: "Wow! Why didn't I think of that?"

This comic strip brief is a bright beacon that lights our way. It illuminates and illustrates what we practicing lawyers are capable of. It does not mean we all should now flood the courts with a tidal wave of comic strip briefs. That would not be creativity; that would be copying, with much diminished impact. But should not the rest of us, could not the rest of us, practice law with more imagination? Would not it be great if we could be more creative in our daily practice? Should we not at least try? And how do we nurture, encourage, nourish, and cultivate a cast of mind in ourselves and in our colleagues that favors imagination and creativity in our professional lives? But first we have to define what we mean by imagination and creativity.

WHAT ARE IMAGINATION AND CREATIVITY?

Defining imagination and creativity is not so easy. In many senses, the mystery of creation defies analysis; mystery must forever surround the creative act. Creativity cannot be reduced to formulas or recipes. But, like Justice Potter Stewart's famous description of obscenity, we know creativity when we see it. Maybe we can come up with a better description.

Creativity requires imagination, because imagination lets you be creative. And imagination in turn is a mysterious, hard-to-explain quality, a freedom, a vision, a sense of wonder and awe, a spirit of adventure, an air of innocent merriment, a free play of the mind, a letting go, a certain puckishness, a magical, child-like ability to go beyond the ordinary. Creativity and imagination produce results both surprising and dramatic.

Imagination is what we sometimes bring, if we are lucky, to another task. Imagination improves and enhances what it is used for; it leavens anything it comes near. "Leavening" is a good way of describing imagination: imagination is the yeast that lifts any work product -- including attorney work product -- to a new dimension. Unleavened lawyering is like unleavened bread -- matzoh -- dry and unappetizing.

Leaps of creativity give us new and unexpected achievement in any field. Imagination is one of the glories of being human, perhaps even what it means to be human. "Imagination," said Albert Einstein, and he ought to know what he was talking about, "is more important than knowledge."

Novelty and Appropriateness. Creativity includes two crucial elements: novelty and appropriateness. Creativity requires that something must be different from what has been done before. But that something cannot merely be different for the sake of difference alone. "[W]hat may seem like pioneering," our

old friends Strunk & White (The Elements of Style) tell us, "may be merely evasion, or laziness -- the disinclination to submit to discipline." In other words, creativity must also be appropriate, correct, useful, valuable, and meaningful. Only if something is both new and useful will it qualify as creative.

Among the components of creativity are: (1) an individual's expertise in a field, (2) motivation, and (3) an atmosphere conducive to generating novel and useful ideas. Some creativity-relevant skills include independence and non-conformity, orientation toward risk-taking, capacity for abstract thinking, and tolerance for ambiguity and perseverence. Such conditions exist in abundance for many (but not all) lawyers.

CREATIVITY AND LAW

The practice of law does not have to be dull or boring. Creativity and the practice of law should go hand in hand. Contrary to what some people think, law should not inhibit the imagination; it should encourage it. It all depends on the lawyer, and how he or she approaches professional tasks, what attitude he or she brings to the job. There may be dull or boring lawyers, but the practice of law can be inventive and exciting. In any event, the practice of law can surely benefit from appropriate creativity and imagination.

In his 1928 book The Paradoxes of Legal Science, the great Benjamin Cardozo, one of our most creative judges, referred to a

"kinship" between the "creative process in art" and the "creative process in law." The bridge between the two, said Cardozo, is imagination. "Imagination, whether you call it scientific or artistic, is for each the faculty that creates."

Wallace Stevens: Poet/Lawyer

A good illustration of this relationship is the work of Wallace Stevens. He was one of the most significant and most original twentieth-century poets, on a par with Yeats, T.S. Eliot, Hart Crane, and Robert Frost, and perhaps the major American poet after Walt Whitman and Emily Dickinson.

Stevens' poetry is beautiful. Like much of modernist culture, it is abstract, but it uses rich and memorable language and images and, according to leading critic Helen Vendler, is "nothing short of miraculous." The most central, core theme of Stevens' poetry, its consuming idea, is imagination. In his poems he speaks of imagination as "the magnificent cause of being, the one reality in this imagined world," he hates "the World without Imagination," and he says "God and imagination are one."

But Stevens led a double life. He was not only a poet, he was also a full-time, practicing lawyer, an insurance lawyer, to be precise. He worked for the Hartford Accident and Indemnity Company and was in charge of its fidelity and surety claims division for decades and was heavily involved with litigation.

(He could even have been a member of FDCC!). He was a lawyer who actually earned his living as a lawyer and, from the beginning to the end of his long legal career, wrote poetry on the side, in his spare time. The law was his day job.

Stevens felt that his legal work, like his poetry, required creativity and imagination. "Poetry and surety claims aren't as unlikely a combination as they seem," he said. "There is nothing perfunctory about them, for each case is different." Referring to his insurance defense work, he added: "There is nothing cut and dried about any of these things: you adapt yourself for each case." Wallace Stevens took a creative approach to his law work, no matter how routine it may have seemed to the uninitiated. We need to heed Stevens and not view our legal work as "cut and dried," but as an opportunity for creativity.

HOW LAW NOURISHES CREATIVITY

Legal training and practice should nourish one or more of the major components of creativity. Law does not, or at least should not, dry up one's creativity. Legal problems often call for creative solutions, and a creative individual is someone who regularly solves problems. That is what we lawyers do.

Legal thinking primarily involves logical analysis and narrative. The lawyer must obviously be skilled at arguing and giving reasons, in systematic or theoretical explanations, for this is the core of most legal reasoning and argument. A lawyer

must also know how to tell a story. According to Professor James Boyd White, author of the brilliant 1973 book The Legal Imagination, "The lawyer is at heart a writer, one who lives by the power of his [or her] imagination." Creative legal thinking depends on imaginative use of these processes. As a result of this link alone, lawyers may be conditioned for creativity. Mature and creative legal thinking must also accept uncertainty in the law, and even this uncertainty as an opportunity.

Imagination is a valuable trait in a lawyer. Whether looking for a loophole in the law, constructing a new constitutional argument, drafting an agreement, breaking a negotiating impasse, or crafting the right questions to ask a witness, imagination is important. Louis Begley, a retired corporate lawyer and prize-winning author of several highly regarded novels, says "the best and most useful lawyers are precisely the ones who are most inventive and imaginative, provided they temper invention and imagination by the exercise of good sense."

A World of Make Believe. Imagination sometimes involves pretending, and the actual practice of law can often seem to invoke a host of "let's pretend." Legal fictions, rules of evidence and rules of procedure can subordinate truth and reality in the legal hierarchy, so that courtroom truth or legal truth may not necessarily correspond to life or reality. Lawyers, in

the course of advocacy, are myth-makers, as they try to make their clients seem more deserving.

Skepticism. Creative people tend to be skeptical, and reluctant to acquiesce in the findings of authority just because these have become generally accepted. Lawyers develop a skeptical attitude in general, which may enhance creativity. Experienced lawyers do not necessarily believe everything they hear from witnesses or even clients. Law school contributes to such skepticism. Scott Turow in One L wrote: "Thinking like a lawyer involved being suspicious and distrustful. You reevaluated statements inferred from silences, looked for loopholes and ambiguities. You did everything but take a statement at face value."

Attitude to the Past. This lawyerly skepticism generates a special and ambivalent feeling toward the past as represented by precedent. Although by temperament and training many lawyers may seem deferential to precedent, often enough they reject or at a minimum question precedent. Studying and working for years with precedents reveals their limits, and may subtly and paradoxically induce a turn of mind that yearns to rebel against the past. Those who deal all the time with precedent quickly learn not to worship it, but to manipulate it, to distinguish it, to abandon it. We point to precedent when it is helpful, but otherwise do not make a fetish of it.

Law school at its best stresses critical and creative thinking rather than rote memorization. The typical law school exam tests a student's ability to spot legal issues in a complex hypothetical fact pattern.

But enough abstract theory. How can we, how do we, apply such theory in actual practice? Let's look at some concrete examples of creative lawyering.

SOME CONCRETE EXAMPLES

Occasions for a creative approach in our practice of law are almost limitless. They arise daily, sometimes even more than once a day. From writing briefs to formulating arguments, from framing questions to presenting evidence, all such common lawyer tasks present chances for lawyerly creativity. We should recognize them and then seize them.

Technology

Technology obviously supplies us with many opportunities for creative and more effective lawyering. Power point presentations and replay of video-taped depositions, for instance, can add persuasive power in court. A deposition witness's demeanor and affect do not come across nearly as well from merely reading a transcript in court. A defense video of a plaintiff in a personal injury case showing him or her conducting normal, vigorous physical activities could demolish a claim of permanent

injury or disability. But too much use of technology, even as it dazzles, can distract and detract from your message. There are limits. The message is more important than the medium.

Demonstrative Evidence

Likewise for demonstrative evidence. Charts, diagrams, tables, models, poster boards, skeletons and so on all supplement mere oral testimony and have a deeper impression. People -- judges as well as jurors -- retain more if they see as well as hear the facts. Information is more memorable when it registers on more than one of our senses.

Storytelling

The "central act of the legal mind, of judge and lawyer alike, is," says Professor White, "to tell the facts (the story) and present the legal analysis (theory) in a single work of the imagination." White goes on: "the activities that make up the professional life of the lawyer and judge constitute an enterprise of the imagination, an enterprise whose central performance is . . . the translation of the imagination into reality by the power of language."

Since much of what we do is tell stories, we lawyers are in large part authors, with all the flexibility and artistic room that implies, limited only by facts, evidence, and ethical rules. But even subject to those professional limitations, legal

storytelling is highly creative and innovative. It is narrative art, and we are the artists.

Here is a striking example of that art as reported in the February 2015 issue of the ABA Journal. The defendant in a criminal case did not testify at trial, and the prosecutor read into the record surveillance transcripts of the defendant's conversations. To counteract the prosecution's transcripts, nimble defense counsel, in summing up, used hand-drawn cartoons to contrast his client's spoken words (shown in hard-line cartoon bubbles) with the subtext of defendant's internal thought processes (portrayed in cartoon "thought bubbles"). Put another way, defense counsel presented his client's virtual testimony even though the defendant never took the stand and there was no testimony or evidence in the record to substantiate defense counsel's claims about what the defendant was actually thinking.

This illustrates, says Peter Meyer, author of the book Storytelling For Lawyers, how "shrewd and successful trial lawyers often take calculated risks to go beyond the evidence given into the imaginative dimension of creative artistry and narrative persuasion."

Brief-Writing

General. Writing a brief is another many-sided golden opportunity for creativity. A brief is a piece of written advocacy that cries out for imagination. But most books about

brief-writing dwell on the mechanics of that task, without mentioning, much less stressing, creativity. Bryan Garner's book The Winning Brief is an exception. "Few legal writers," Garner there points out, "seem to think of their work as being essentially creative. They often think that writing well is simply a matter of finding the law and getting it down." On the contrary, Garner correctly says, "every brief presents opportunities for creativity -- for imaginative approaches." Absolutely. We can try to make our legal briefs into at least minor works of art.

In setting forth the facts, for instance, the lawyer again becomes a short story writer who can sequence, describe, and stress those facts in a way most favorable to the client. Similarly, the points of argument can be creatively ordered to make the greatest impact. Narrative and analysis obviously draw on creativity. But there is more.

Opening Sentences. Consider, also, the way we write the opening sentence of a brief. That is a task we have all done many hundreds of times. Yet it often does not get the attention it deserves. How many times have we seen (or composed) the boring, commonplace, mechanical, formulaic first sentence that does no more than merely repeat the title of the brief right above it? The title of the brief, in bold or all caps, is "Plaintiff's Brief In Opposition to Defendant's Motion to

Dismiss" or "Defendant's Brief in Support of Summary Judgment," and we write as the first sentence of our brief: "Plaintiff submits this brief in opposition to Defendant's motion to dismiss," or "Defendant submits this brief in support of summary judgment." Such opening sentences are worse than trite: they are missed opportunities.

With a little bit of imagination and effort, we can easily do better, much better. In other words, be creative, use your imagination. The first sentence of a brief, like a newspaper lead, is a wonderful opportunity to grab a reader's interest and start to persuade. Crisp, cogent leads, as Tom Goldstein and Jethro Lieberman tell us in The Lawyer's Guide to Writing Well, are as useful for lawyers as they are for journalists. The lead is a signpost, a means of orienting the reader to the path to be taken, a way to tell the reader how to make sense of what follows.

The argument starts with the first sentence, which is a stress point, a point of emphasis. Why can we not come up with, that is, create, our own effective and memorable "Call me Ishmael" first line? How about the following opening lines taken from actual briefs:

1. "The long-delayed opposing papers from plaintiff were hardly worth the wait."

2. "Plaintiff's opposition papers illustrate the law of

unintended consequences. Rather than demonstrating why dismissal should be denied, plaintiff's opposing brief actually shows why his amended complaint should be dismissed."

3. "This is a meritless case, brought in the wrong court, based on an imaginary, implausible, unsubstantiated, unenforceable oral contract."

4. "There are times when a plaintiff who brings a baseless lawsuit and causes blameless defendants to incur substantial legal fees should not be allowed to preserve its option and escape any consequences simply by filing a voluntary notice of discontinuance. This is one of those times."

5. "With this appeal, appellants persist in their ill-conceived attempt to enforce a non-existent superseded non-compete clause."

6. "This case is about an attorney-client relationship that soured in the brine of lawyer overreaching and deception."

7. "Sometimes a lawyer's brief inadvertently or subconsciously reveals much more than the author intended. When that happens, we occasionally see into the heart of the matter. That insight is exactly what has now occurred with [ ]'s brief."

8. "This is a case about fairness and common sense as against an arbitrary rule."

9. "'What a cobweb of fine-spun casuistry'! Cardozo's

words fit the opposition's briefs perfectly."

10. "Plaintiff continues her international forum-shopping spree."

11. "Respondent's brief understandably runs away from the stipulation at issue."

12. "This is a motion to prevent grossly disproportional -- and therefore unconstitutional -- penalties in a First Amendment context from taking effect before being scrutinized by this Court. The purpose is to preserve the status quo for judicial review."

13. "This arbitration arises from respondents' corporate raiding of the bond department of Claimant, which forced Claimant to close the department and incur millions of dollars in losses."

14. "This appeal arises from the lower court's fundamental misapprehension of the obligations a publisher owes to its author."

15. "The overarching question raised by this appeal is whether the requirements for pleading securities fraud related to the on-going financial crisis should be applied in a way that ensures the accountability of corporate executives or in a way that shelters executives from being judged for their conduct. To pose the question is to answer it, and the answer explains why the decision below dismissing appellants' securities fraud action should be reversed."

16. "To avoid their obligation as non-party witnesses to produce vital evidence, [ ] wrap themselves in the First Amendment. It is a poor fit."

17. "This is a strike suit masquerading as a trademark dispute."

18. "The time has come to bring down the curtain on this farce" (in a case about the disputed funding of a Broadway show).

19. "Plaintiff's answering papers are like this winter's weather. Having experienced several snowstorms this season, we and the Court know a blizzard when we see one. Plaintiff's opposition is a blizzard of irrelevancies designed to blind the Court. But this winter has taught us all how to deal effectively with all sorts of blizzards, this one included."

20. "Every so often a complaint is filed that has so many fatal flaws and defects, is barred at the threshold by so many legal doctrines, that a lawyer almost does not know where to start in structuring a motion to dismiss. The abundance of defenses almost bewilders the conscientious brief writer. This is such a case. . . . The amended complaint is a law professor's dream. It reads like a bizarre hypothetical on a civil procedure examination testing a first-year student's ability to spot all the several reasons why a pleading should be thrown out."

21. "This a 'perfect storm' of an appeal. It combines international terrorism, free speech, the Internet, and something

called 'libel tourism.'"

Each one of these real-life openings draws the reader in and starts to persuade from the get-go. It is not simply a matter of your writing skill; it is a matter of the spirit, the attitude in which you approach your task. Why be a slave to the way others write? Oliver Wendell Holmes famously said, "It is revolting to have no better reason for a rule of law then that is was laid down in the time of Henry IV. It is still more revolting," he went on, "if the rule simply persists from blind imitation of the past." So too with opening lines of legal briefs.

We need not blindly imitate or lazily perpetuate bad practices, no matter how widespread. You have an independent mind that can draw on all your education, ability, professional experience, reading and knowledge of the world and of human beings to <u>create</u> an effective, original opening line for <u>your</u> brief that persuades the court to see the world as your client sees it. More senior people in our profession have an opportunity -- and an obligation -- to instill and encourage such creativity in younger lawyers and thereby develop better advocates.

With a bit of imagination, most legal briefs can begin memorably and in any event much better than the dull, wooden cliché of: "Plaintiff submits this brief in support of [or in opposition to]. . . ." Of course there may be some issues --

discovery disputes, for example, come to mind -- that do not easily or readily prompt creative opening lines, but the truth is that probably seven out of ten briefs could have a creative lead sentence or paragraph. We should look for and utilize those opportunities.

Answering Opposing Arguments. A similar opportunity arises when composing a section of your brief that answers an argument of your adversary. But that opportunity is frequently overlooked. Many brief writers will start important sections of their briefs with topic sentences such as "Plaintiff [or defendant] argues that" and proceed to restate their adversary's argument before going on to try to refute it. We all understand the familiar straw man formula of setting up a target in order to knock it down, and how we outline the points in our brief before actually writing, but why use the crucial topic sentence or first paragraph of a major point in a brief to do your adversary's work, perhaps better and more clearly than your adversary did?

Rather than simply restating your opponents' argument, be creative and use the topic sentence to attack rather than reinforce that argument. The topic sentence in a point section of a brief is the first thing a judge will read about that argument. Use it to advantage. Regain the offensive immediately in response to your opponent's argument. Many lawyers write, at the start of, say, Point I of a brief by plaintiff, "Defendant

argues that the action is barred by the statute of limitations because. . . ." This topic sentence, or something close to it, mars most briefs.

Instead, why not begin with something like: "The action is timely. It was filed within 11 months of the incident. Defendant's argument based on the one-year statute of limitation therefore fails." This is a straightforward positive statement of <u>your</u> argument, allowing you to expand on it, and if you have to explain more of your opponent's faulty reasoning, you can do so in a subordinate placement. The suggested approach stresses why you win and your adversary loses. All it takes is a little creativity, which makes all the difference here.

<u>The Brandeis Brief</u>. Speaking of brief-writing, let us recall one of the most creative innovations in that skill. Louis Brandeis was a great practicing lawyer before going on the Supreme Court. His most important contribution to the "practice" of law was the "Brandeis brief." That audacious development was a collection of social facts rather than legal argument to educate judges about current needs.

Brandeis first used it in 1908, more than a hundred years ago. The case was <u>Muller v. Oregon</u>, which involved the constitutionality of a state law limiting to ten the number of hours a woman could work each day in a laundry. Brandeis had to come up with a way to present such a question persuasively in

support of the statute. Only three years earlier, the Supreme Court had held in Lochner v. New York that limiting bakers' hours was unconstitutional as a violation of "liberty of contract." Rather than attack Lochner, Brandeis did the unexpected and transformed an apparently unfavorable precedent into a favorable one.

Here is how he did it. He cited Lochner as authority for a state to act where necessary to protect the health of workers, reasoning that the Supreme Court wanted more information than it got in Lochner. He decided to devote his brief in Muller almost exclusively to facts showing that long hours of manual labor for women were unhealthy. The result was an unusual two-page summary of the law and 144 pages of reports and quotations showing the relevant facts justifying the state law in question.

The Supreme Court upheld the Oregon statute and specifically noted the materials in the fact-packed Brandeis brief. It was an epoch-making creative technique that would be used again and again, and would help many years later to overthrow segregation in public schools.

Surely each of us can learn from Brandeis's example, and use a Brandeis-type brief when an occasion calls for it.

Tactical Loss and Strategic Victory

Another way to be creative in law practice is to think big, to think long term, to grasp the crucial difference between

tactics and strategy. Tactics are small-scale actions with only a limited or immediate end in view serving a larger purpose. Strategy, in contrast, is the use of various tactics to achieve that larger purpose of goal. Tactics: small, near-term; strategy: long-range ultimate goals.

Here are two examples of lawyers (who happen also to be judges) making creative use of the difference between tactics and strategy, who accept a tactical loss in favor of a much more important (though perhaps somewhat hidden) strategic victory. I am referring to a peculiar but striking similarity between two important Supreme Court cases familiar to you all. One of them is old, one very new.

The first example is a case from our first semester in law school, perhaps the most famous case in the history of the Supreme Court -- Marbury v. Madison. Remember what that case was about. John Adams and his Federalist Party lost the election of 1800 to Thomas Jefferson. On his last night in office, out-going President Adams signed commissions appointing several judges (the so-called "Midnight Judges"), including one for Marbury. But the new Jefferson Administration, with James Madison as secretary of state, refused to deliver the commission to Marbury.

Let us look at just one masterfully creative aspect of what Chief Justice John Marshall, a leading Federalist (who had incidentally been Adams' secretary of state), did in that case.

He agreed that Federalist Marbury was entitled to his magistrate's commission, but denied relief because the Supreme Court lacked jurisdiction under the Constitution to issue the writ. For Marshall and his Federalist Party, that was a tactical loss.

But Marshall got a tremendous strategic victory. He avoided a political confrontation with the executive branch since the Jefferson Administration might well have disobeyed a contrary decision by the Court, which would have reduced Federalist judicial power. At the same time, he assumed a far more vital and long-ranging concept on the part of the Court. He invoked (some say he "invented" or "usurped") the power of judicial review. He ruled that the Court lacked jurisdiction because the relevant section of the Judiciary Act of 1789 was unconstitutional. He sacrificed the narrow outcome of the particular case for the particular litigant in exchange for something far more important and more lasting.

Fast forward to 2012. Look at a similar creative approach taken by Chief Justice Roberts in the Affordable Care Act case. You will recall that the constitutionality of that law was quite unsettled before the Court ruled. The Court ultimately found it constitutional by a five-to-four vote, but consider what happened.

The main point of contention in the Affordable Care Act case

was whether the statute was a proper exercise of Congress's constitutional power to regulate interstate commerce. Four liberal justices found it was constitutional under the Commerce Clause. Four conservative justices disagreed, saying it was unconstitutional under the same Commerce Clause.

Enter Chief Justice John Roberts. He agreed with the conservative point of view about the law violating the Commerce Clause, but surprised everyone by upholding the health care statute as a constitutional exercise of the Taxing Power. Roberts shrewdly traded the tactical loss of the validity of the liberal health care law in return for a strategic victory of avoiding a confrontation with the Obama Administration and amassing a conservative majority for what he undoubtedly hoped would be a long lasting, limiting interpretation of the commerce power. I guarantee you that future cases under the Commerce Clause will debate the significance of Chief Justice Roberts' opinion in the Affordable Care Act case.

In this sense Marbury and the Affordable Care Act case are similar and equally fascinating illustrations of the creative practice of law. Had the Solicitor General not made the tax argument -- which seemed a stretch to many observers -- the government would have lost the case. Lawyers make the law more than judges, for judges almost always are responding to arguments made by lawyers, picking and choosing which path to follow.

Desegregation Litigation Strategy

One of the most successful examples of creative lawyering, of legal strategy and tactics, was the decades-long march through the courts against racial segregation. The lawyer who quarterbacked that campaign from the 1930s on was Thurgood Marshall for the NAACP. Marshall decided that the assault on legally sanctioned racism should focus on one area of life. If it fell in one area, Marshall figured, presumably it would fall elsewhere. Marshall chose segregated public education as the point of attack because of the central importance of education in our society and the demonstrable inequality that existed. Education was, to Marshall, segregation's soft underbelly.

Once education was selected, the issue became what sort of attack to mount. Should the hateful "separate but equal" doctrine of Plessy v. Ferguson be challenged outright, as many at the NAACP understandably wanted? Or should Plessy be chipped away at over time until it collapsed? The mood of the country and the attitudes of the Supreme Court led Marshall's team, not without significant internal disagreement, to adopt the chipping away approach.

What followed was a skillful, creative, patient legal attack that ultimately resulted in the Supreme Court's overturning of Plessy in 1954. In a series of graduate school cases, Marshall persuaded the Supreme Court that separate facilities provided for

African-Americans were in fact unequal and therefore in violation of Plessy. Moving beyond the inequalities in physical facilities, Marshall argued successfully that even intangible qualities made for inequalities in racially separate professional graduate schools. In none of those cases was Plessy attacked outright (except in amicus briefs solicited by Marshall), but Marshall's arguments and briefs were body blows to the "separate but equal" doctrine. By 1954, when Brown was decided, Marshall's careful strategy had completely eroded the constitutional props supporting Plessy.

Creative Cross-Examination

A contemporary of Cardozo's, Jerome Frank, also touched on legal creativity in his path-breaking 1930 book Law and the Modern Mind. Frank was one of the Legal Realists, a New Dealer, chair of the Securities and Exchange Commission, a law professor and a federal judge. Lawyers, Frank wrote, should "catch the spirit of the creative scientist," a spirit that "yearns not for safety but risk, not for certainty but adventure, thrives on experimentation, invention and novelty and not on nostalgia for the absolute." The hallmark of a good lawyer was, for Frank, this creative spirit.

We all have war stories about memorable cross-examinations, but I want to talk about two of the most creative in American legal history. They vividly illustrate the creative spirit

described by Jerome Frank.

Darrow in the Scopes "Monkey" Trial. The first is Clarence Darrow's examination of Williams Jennings Bryan in the 1925 Scopes "Monkey" Trial. In that case, Darrow and the ACLU defended a school teacher bold enough to violate a Tennessee law barring the teaching of evolution. Quite apart from the substance and method of Darrow's questions, the creative stroke inhered in who Bryan was in context of the case.

Bryan was Darrow's adversary. Who ever heard of calling your adversary lawyer as an expert witness, particularly in a high profile case? Yet in the closing hours of the seventh day of the trial, Darrow in a surprising and dramatic move called Bryan to the stand as an expert on the Bible. Darrow's courtroom dissection of bombastic Bryan's literal interpretation of the Bible was the high point of the trial and made immortal by H.L. Mencken's newspaper reporting and by the play and the movie "Inherit the Wind."

Max Steuer and the Overly Rehearsed Witness. Another unforgettably creative cross-examination occurred in the criminal trial following the terrible Triangle Shirtwaist Fire in 1911, which killed 146 sweatshop workers, mostly young immigrant women barred by locked doors from escaping the blaze in their New York City factory. That fire was a turning point in the history of labor because it led to significant reforms in workplace health

and safety laws. Within a month of the fire, the government indicted the two owners of the factory on manslaughter charges. For their defense counsel, the owners chose Max Steuer, a legendary New York trial lawyer in the early part of the last century.

Steuer had a creative streak that he employed to great advantage in the courtroom. "No one at the New York Bar," wrote Francis Wellman, author of the classic Art of Cross-Examination, "knows more about the way to conduct a trial from an artistic point of view than Mr. Steuer." Note the word "artistic." Steuer proved Wellman correct in the Triangle Shirtwaist trial.

Just before the prosecution rested, it called a final eye-witness to supply crucial evidence. After she described the horror she had seen, tears ran down the cheeks of the jurors. Steuer began his cross-examination slowly. After some preliminaries, he violated one of the cardinal rules of cross-examination by asking the witness to repeat the story she had given on direct. We are taught not to do that so as not to reinforce by repetition the adverse witness's harmful testimony. But Steuer had the courage of his creative instincts; he found a proper occasion for breaking the rule.

In repeating her testimony, the witness used the exact same words she had used the first time. Steuer asked her again to tell what she saw, and the witness said the same thing, except

she omitted one word. Steuer asked whether she had left out something, and he suggested the missing word. Her lips began to move and start the narrative to herself all over again, and when she reached the spot where that word belonged she said, "Yes, I made a mistake; I left that word out." Steuer prompted, "But otherwise your answer was correct?" She again began to move her lips, obviously reciting to herself what she had previously said, and then said, "Yes, otherwise my answer was correct."

Steuer again asked her to tell what she had observed at the fire. She again started her answer with the exact same first word and continued her narrative, but again left out one word, this time a different word. Steuer asked whether she had not now omitted a word, identifying it. She went through the same lip performance and replied that she had, and, on being asked to place the word where it belonged, she proceeded to do so.

The tears in the jury box had dried. The situation had changed entirely. The witness had, ironically, helped the defense, not the prosecution. The constant repetition of her story showed a carefully prepared, memorized, coached and rehearsed recital, rather than a spontaneous recollection of actual events. It even struck some observers as perjured. She had thrown doubt on the testimony of the other prosecution witnesses. Her carefully prepared testimony had aroused the jury's suspicions of the entire prosecution's case. The jury

acquitted.

Summation

For many of us, summation is the high point in the art of advocacy. It is the climax of a case. It calls for every skill the advocate possesses. It calls for more than skill -- it summons the advocate's creative juices, all the lawyer's powers of persuasion. Summation involves weaving argument, sympathy, logic, the evidence, history and morals into a convincing performance.

As the late Melvin Belli, a master of the courtroom, put it: "Imagination is probably the greatest attribute a trial lawyer can have. When a case comes into the office, sit down and use your imagination before you abdicate to the law books and other people. Before you research and see what has been done in the past, think what you would do. Your imagination is as important as knowing the law."

My favorite example of creative summations are those of Clarence Darrow. Even when he represented unpopular clients, Darrow captivated juries. He spoke for hours without notes. He made jurors feel what he was trying to say, and those closing arguments still make compelling reading.

Reread Darrow's closing arguments (as well as Churchill's World War II speeches) as part of your preparation before summing up to a jury. Arthur Weinberg has collected Darrow's jury

speeches in a splendid volume called Attorney for the Damned. I have read and re-read my copy so often that its spine is broken, its pages dog-eared, tattered, underlined and annotated. What Darrow says and how he says it move me greatly during the lonely and critical period just before speaking to a jury for the last time in a case. Reading the master's efforts helps. Darrow's words put one in the right mood, the right frame of mind, for summing up. They inspire us lawyers as well as jurors.

INNOVATE QUIETLY

Sometimes we have to mask our creative practice of law. This is because the law stresses precedent. When and to what extent the decisions of the past should be respected are central questions in the law -- perhaps the central questions. But those who practice law know that merely to preserve the fixed forms of the past would be a system of idolatry. The "tyranny" of precedent, Cardozo once wrote, "breeds rebellion, and rebellion an emancipator."

What this means for practicing lawyers is that we have to find creative and subtle ways to make change. The hallmark of legal method is to hide dramatic change. The most pressing demands on law are often stability, certainty, continuity, and predictability -- a cluster of powerful demands militating against advertising fundamental or abrupt change in the law. We have to innovate in the guise of following precedent.

The masterful Cardozo is a prime example of disguised innovation. His revolutionary decision in MacPherson v. Buick (eliminating the requirement of privity in products liability cases) and several other cases are packaged so as to give the impression that no change is happening. Such a soothing technique characterizes revolutions in law. They are quiet revolutions.

The more innovative the point we are trying to make, the more we have the strain to prove that no novelty -- not the slightest departure from prior law -- is involved. As we creatively turn the law upside down, we have to make the result seem inexorable. Legal innovations need the appearance of doctrinal continuity.

We need, as practicing lawyers, to take a hint in this regard from the Supreme Court. When that Court overrules a precedent, it does so quietly. For example, when the Supreme Court in Mapp v. Ohio for the first time applied the exclusionary rule to state criminal cases in 1961, it did not follow a 1949 case that went in an opposite direction. Yet the Court said its holding in Mapp was "the logical dictate of prior cases." In Gideon v. Wainwright, the Court in 1963 required states to supply attorneys free of charge to indigent defendants accused of serious crimes. Gideon overruled a 22-year-old precedent, Betts v. Brady, calling it "an anachronism when handed down."

Most expressions of sea change in the law are neither assertive nor candid. Always sensitive about the exercise of power, American judges tend to be superstitious or inconspicuous when they are asked to make changes in the law. To achieve change in law, we must therefore be creative and imaginative to find ways to hide what we are in fact doing, to present change as a natural evolution.

OUR DAILY QUEST

When we practice law, we have many creative moments. Choices that we make in handling a case and presenting legal arguments often turn on what Cardozo called (New York State Bar Address 1932) a "hunch," "sensation," or "intuitive flash of inspiration." The practice of law has, again in Cardozo's words (The Paradoxes of Legal Science), "its piercing intuitions, its tense, apocalyptic moments." That is the essence of creativity, of seeing links between apparently unrelated phenomena.

But it is creativity within limits. The practice of law circumscribes the scope of possible creativity. Just as a sonnet has 14 lines within which a poet displays imagination, so too we lawyers have certain rules, a framework, to abide by. Rules of procedure, rules of evidence, rules of ethics, and the like are our profession's equivalent of the mandatory 14 lines of a sonnet. Indeed, the existence of such rules actually generates creativity within the system.

"There is emancipation in our very bonds," wrote Cardozo in The Growth of the Law. "The restraints of rhyme or metre, the exigencies of period or balance, liberate at times the thought which they confine, and in imprisoning release."

So why should we aspire to take a creative approach to our practice of law? Holmes gave one folksy answer in his wonderful 1897 speech "The Path of the Law." "I heard a story the other day," Holmes began, "of a man who had a valet to whom he paid high wages, subject to deduction for faults. One of his deductions was 'for lack of imagination, five dollars.'" Without expressly mentioning, but clearly implying, whom he was referring to, Holmes (probably with a wry smile and twinkling eyes) warned his audience of lawyers: "The lack [of imagination] is not confined to valets." None of us should be like that valet and be accused of lack of imagination.

Creativity is a leavening agent for what we do. It makes the practice of law more interesting and more fun. It draws on our creative impulses. It is stimulating. It adds another dimension to what we do every day, it takes our practice to another level. It makes us like creative artists, with surprising and dramatic results. It also happens to make us better lawyers and increases our chances of success. That is why we should aspire to take a creative approach to our practice of law.

But "why" is only the first inquiry. The real question is "how?" How can we take a creative approach to the practice of law? What specific lawyering tasks can improve with a dash of creativity? Not every case calls for a comic strip brief, but every case does require our best efforts, including our imagination. Finding those opportunities for creative lawyering is, or at least should be, our daily quest.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA Plaintiff, v. APPLE, INC., HACHETTE BOOK GROUP, INC., HARPERCOLLINS PUBLISHERS, L.L.C. VERLAGSGRUPPE GEORG VON HOLTZBRINK PUBLISHERS, LLC d/b/a MACMILLAN, THE PENGUIN GROUP, A DIVISION OF PEARSON PLC, PENGUIN GROUP (USA), INC. and SIMON & SCHUSTER, INC., Defendants.	)	Civil Action No.12-CV-2826 (DLC)

BRIEF OF BOB KOHN AS *AMICUS CURIAE* *

* Five-page version of Proposed Brief *Amicus Curiae* at Docket No. 97.

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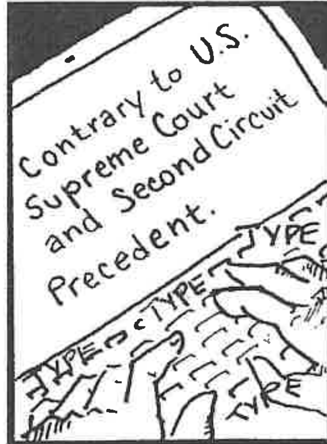
Memorandum & Proposed Brief Amicus Curiae of Bob Kohn, Docket No.97 (August 13, 2012)....i

Five pages?
Five pages.

AT HOME
Are the DOJ's conclusions reasonable?
See, Keyspan

Court should defer to DOJ, but not when its conclusions are unreasonable.
TYPE
TYPE
TYPE
Id.

Relief sought is an instrument of wrong to the public
TYPE
TYPE
TYPE


Contrary to U.S. Supreme Court and Second Circuit Precedent.
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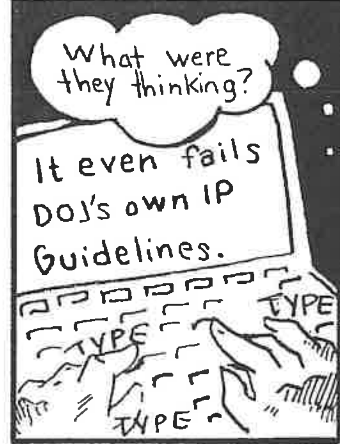
What were they thinking?
It even fails DOJ's own IP Guidelines.
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It's all going digital.
IP Guidelines say copyrights are different.
TYPE
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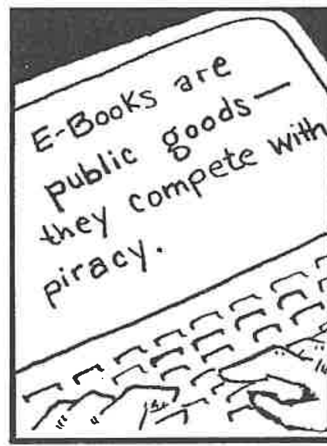
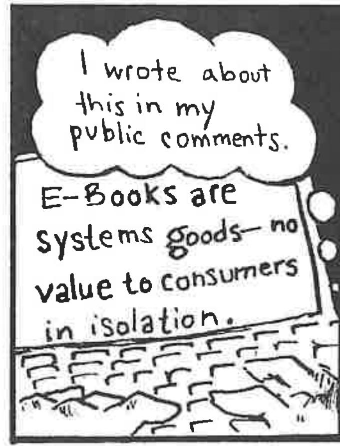
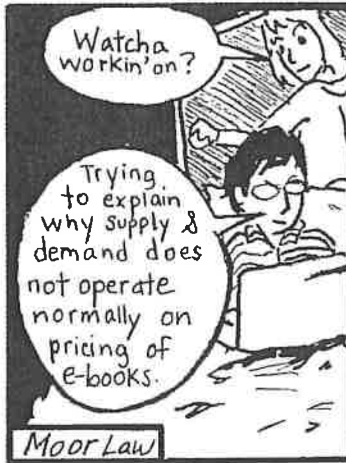

E-Books are public goods— they compete with piracy.


I wrote about this in my public comments.
E-Books are systems goods— no value to consumers in isolation.


Watcha workin' on?
Trying to explain why supply & demand does not operate normally on pricing of e-books.
Moor Law

Oh, because of illegal downloading
Right. And because of network effects, you also must look at effect of a restraint on a number of different goods markets.
IP Guidelines

And you must weigh the restraint against the pro-competitive benefit in these different markets.
Why?

Because if the restraint is reasonably necessary to achieve the benefits, it's legal.
Id.

THE NEXT DAY
Says who?
Says the DoJ's own U.S. Supreme Court authority!
FTC v. Indiana Dentists Assn

I'm not a lawyer, but that sounds like a major screw-up.
Yup.

My challenge is to explain all this in five pages.
So, what did the Supreme Court say?

The high court said that collusive conduct is ok under rule of reason where there is a countervailing pro-competitive virtue.
Did they give examples of that?

Yes, a couple, but I like this one the best: horizontal price fixing is ok if it will "create efficiencies in the operation of a market"
Like what?

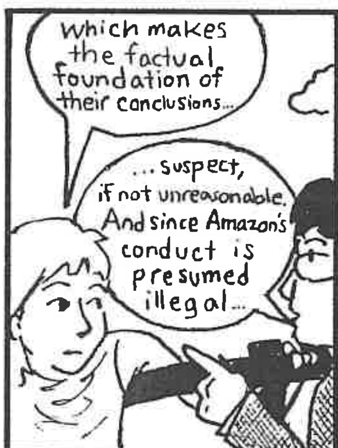
Like counter-vailing Amazon's monopsony power.
Or, counter-vailing Amazon's predatory pricing.
Broadcast Music, Todd v. Exxon

Who said Amazon was a predator?
The DOJ did in their own Complaint & CIS. Amazon sold e-books below marginal cost.

So?
Second Circuit says doing so is presumed illegal.
Northeastern

Why is that illegal? Aren't lower prices good for consumers?
Not always. Selling below marginal cost is just as bad for consumers as selling at monopoly prices.
Id. & ITT

But didn't the DOJ "investigate" Amazon's prices?
It did, but then the DOJ got the law of predatory pricing wrong.
Response at 21-22


Which makes the factual foundation of their conclusions...
... suspect, if not unreasonable. And since Amazon's conduct is presumed illegal...

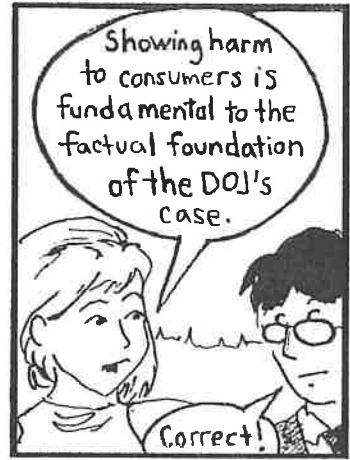
...then either the DOJ turns over its investigation of Amazon's pricing to the Court...
...or the Court must find that Amazon engaged in predatory pricing.

Are you sure you're not a lawyer?

How can we find out more about the DOJ's investigation of Amazon?
The Court has the power to make the DOJ turn over all of its documents concerning its investigation.
See, 15 U.S.C. 16(f).

So, how does all this help solve the case?
You see, when Amazon lowered e-book prices to below its marginal cost...

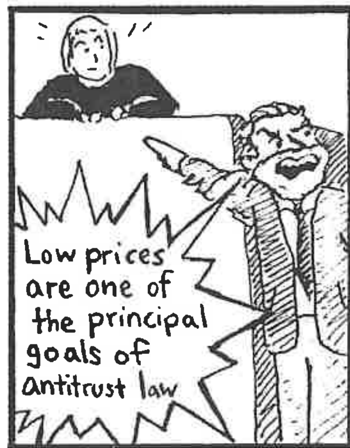
... any conduct that raised them back to marginal cost could not have harmed consumers.
I get it! Let me complete the argument.


Showing harm to consumers is fundamental to the factual foundation of the DOJ's case.
Correct!

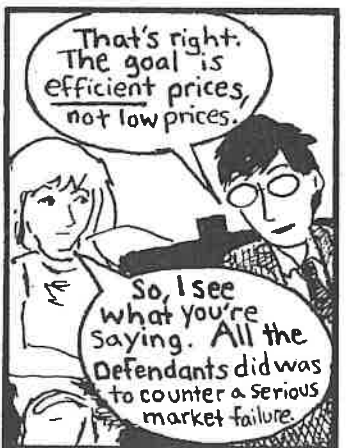
Without it, the DOJ'S Conclusion about the remedy is Unreasonable.
You got it!
Keyspan

Wow! The DOJ really blew this one.
Yup

Where did the DOJ go wrong?
Well, a lot of places. But if I had to point to one it would be this...


Low prices are one of the principal goals of antitrust law

I was gob-smacked when I read that in the DOJ response
Whoa. You don't have to be an economist to see through that.


That's right. The goal is efficient prices, not low prices.
So, I see what you're saying. All the Defendants did was to counter a serious market failure.

... caused by Amazon's actions, which are presumed illegal.
And the Supreme Court & Second Circuit said that's ok.
Indiana Dental Association, Broadcast Music, CBS v. ASCAP

Correct. Even if it takes horizontal price fixing to do it.
I get it.

And they achieved it in a one-time event.
Getting Amazon to voluntarily switch to the agency model.

Correct. A one-time thing.
Not like ASCAP & BMI, who each spend over $150m a year to maintain their price fixing activity.

That's right. No rate hearings, no government oversight necessary here.

Except to make sure they don't engage in any collusive activity in the future.
That's right.

So, if the government's conclusions are not reasonable, the Court cannot hold the settlement to be in the public interest.
Keyspan.

You should've been a lawyer.
Nope, Not for me.

Why not?
I'm a novelist, and it's impossible to tell a complex story in only five pages!
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Respectfully submitted,

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