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TRIBUTES

REFLECTIONS ON JUDGING IN THE FEDERAL COURTS

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The first order of business is to express my thanks, starting with the editors of the *Indiana Law Review*, both for organizing this collection of essays and for giving me the opportunity to respond. While relatively little will change in my day-to-day work as an appellate judge, the transition from active status to senior status marks a time to reflect on my work. I have many other thanks to offer in Part I. After that, I offer some thoughts in Part II about how I approach cases and in Part III reflections about particular topics and questions.

I. THANKS

I start with thanks to the authors of these essays, who have been so generous with their time and with their praise. Without Evan Bayh's support, I would never have had the opportunity to serve in the federal courts. I was proud to help Evan when he served as Governor and admire his public service and achievements in that role and as Senator. Kathleen DeLaney was one of my first and finest law clerks, and I am proud of her courageous representation of controversial clients seeking justice. Brian Paul is a superb lawyer and a brilliant writer who is also generous with his time when the courts have asked him to take on tough cases. Chief Judge Diane Sykes is a smart and persuasive judge, and a great colleague.

Moving beyond these articles, I am grateful to those who have worked with me in my chambers over twenty-eight years on the federal bench in both the district and circuit courts: assistants Jenny McGinnis and Lori Sargent, courtroom deputies Charles E. Bruess, Christopher F. Wright, and Wendy Carpentier, court reporter Fred Pratt and his colleagues for the Southern District of Indiana, and case administrators Peggy Mack and Linda Carmichael. In their respective roles, over so many years, they have been smart, hard-working, and committed to the public services the courts provided. They helped me do our best work as a team.

I hardly know where to begin in thanking the seventy-nine (and counting)

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* Since 2009, David F. Hamilton has served as a judge on the United States Court of Appeals for the Seventh Circuit after serving fifteen years as a judge on the United States District Court for the Southern District of Indiana, including two years as chief judge. A graduate of Yale Law School, he served as legal counsel to Indiana Governor Evan Bayh and practiced at the law firm of Barnes & Thornburg, LLP, in Indianapolis. In December 2021, Judge Hamilton announced his intention to assume senior status upon the confirmation of his successor. In December 2022, the Honorable Doris L. Pryor was confirmed as his successor.

brilliant and hard-working lawyers who have worked with me over these years as law clerks. They have been indispensable in carrying out the judicial work for which I receive the credit. The same goes for so many staff attorneys in both the district and circuit courts, without whom the volume of judicial business would have been much more difficult to manage, and for the clerks' office staffs, librarians, probation officers, marshals, and the IT staff.

Beyond my chambers and courtroom, I have benefited from wise, fair-minded, and generous judicial colleagues in the Southern District of Indiana, in the Seventh Circuit Court of Appeals, and in courts around the country. In the Southern District of Indiana, Judges S. Hugh Dillin, Gene E. Brooks, Sarah Evans Barker, Larry J. McKinney, and John Daniel Tinder welcomed me in 1994 as a new district judge who needed their advice and their understanding. I continued to learn from them and their successors, including Richard L. Young and William T. Lawrence, as well as the magistrate judges and bankruptcy judges in the district.

In the Seventh Circuit, veteran judges again welcomed me in 2009 with sound advice and collegial respect: Frank H. Easterbrook as the chief judge when I joined the court, Richard A. Posner, Joel M. Flaum, Michael S. Kanne, Ilana Diamond Rovner, Terence T. Evans, Diane P. Wood, Ann C. Williams, Diane S. Sykes, and (again) John Daniel Tinder. The same goes for the senior circuit judges when I joined, William J. Bauer, Jack Coffey, Kenneth R. Ripple, and Daniel A. Manion. Special thanks to Richard D. Cudahy, who was "my" judge. I clerked for him when I was fresh out of law school. I was honored to work with him as a colleague on the Seventh Circuit until he passed away in 2015. In the years since, new colleagues have brought their own talents and continued to teach me: Judge (now Justice) Amy Coney Barrett, and Judges Michael B. Brennan, Michael Y. Scudder, Amy J. St. Eve, Thomas L. Kirsch II, Candace Jackson-Akiwumi, and most recently John Z. Lee and my direct successor, Doris L. Pryor, who was confirmed and took office in December 2022.

No judge can do sustained good work without great advocacy from an excellent bar. Judges don't file cases or come up with new theories, claims, defenses, and arguments. That's what advocates do. In case after case, year after year, my work in both courts has benefited from excellent lawyers who asked for my best work.

I also need to express profound gratitude to those who trusted me to do this work well, and who gave me these opportunities in the face of opposition: Presidents Bill Clinton and Barack Obama, Governor and then Senator Evan Bayh, Senator Richard G. Lugar, Representative Lee H. Hamilton, and their respective staffs in the White House and on Capitol Hill. Special thanks also to my friends Peter J. Rusthoven and now-Justice Geoffrey Slaughter, who, along with so many other friends and colleagues, provided key support for my nomination in the face of opposition.

I benefited as a young lawyer from mentors who taught me how to do law right and gave me generous opportunities to learn. These included, after Judge Cudahy, Edward O. DeLaney, Stanley C. Fickle, Donald E. Knebel, James A. Strain, Robert P. Johnstone, Charles E. Bruess (again), Tom Charles Huston, Henry J. Price, Robert D. MacGill, and Peter J. Rusthoven (again), all at Barnes

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Finally and most important, my wife, Inge Van der Cruysse, has provided advice, support, and encouragement for twenty years. As a lawyer and law professor, and especially as a partner, she has made me a better judge and person in more ways than I can count.

II. REFLECTIONS ON JUDGING

A. The Rule of Law — Not to Be Taken for Granted

My reflections on the substance of my work do not amount to an overarching philosophy for decision-making, like Richard Posner's economic analysis of law or others' theories of textualism or originalism. I have been skeptical about sweeping theories, which tend to give way in the face of a large volume of real cases that defy theory. But I have developed strong opinions about a host of legal issues. I have tried to resolve each case fairly, according to substantive law, fair procedures, and the evidence in the case. An appellate court also has a duty to clarify, to question, and to teach. Cases present opportunities to clarify the law, or sometimes to raise questions or doubts, in opinions for the court and sometimes in concurring and dissenting opinions. And as a district judge, I tried to contribute to wider debates about specific legal issues. As a new lawyer and then as a judge starting in 1994, I spent little time thinking about the rule of law, either in general or in terms of the fundamental role it plays in making our federal and democratic republic work. America worked, and I felt no pressing threat to the rule of law. I took it all for granted.

After the Soviet Union's break-up, however, I began to pay more attention to the challenges that newly free nations faced in re-founding institutions of government, including law, and in adapting from command economies to more-or-less free markets. What I saw from my comfortable distance made me focus more on the rule of law in America and what it means for all of us. Individual freedoms are respected. Contracts are enforced. Property rights are respected. Government is limited. People who violate others' rights face consequences. No person or business or government official is above the law. Elections are free and fair, their results are accepted, and power is transferred peacefully to the winners of elections. That was my American faith, while recognizing that we face plenty of challenges in trying to form a more perfect union. I was grateful beyond measure for our generation's inheritance. I saw my role as trying to help us come closer to that ideal for everyone.

As I write in late 2022, we can no longer take that inheritance for granted. We are facing challenges—*internal* challenges, no less!—to the rule of law, to judicial independence, and to representative government itself. Those threats are as serious as any in American history, the Civil War excepted. Too many

politicians—elected officials, candidates, and activists—have shown that they are willing to risk or even discard what the Constitution's preamble calls the Blessings of Liberty, for ourselves and our posterity, in exchange for political power. If threats from the extreme political right go further, more on the political left may defend themselves by embracing similar tactics. The dangers of such escalation are obvious now.

My reaction to these threats has been a Burkean conservatism, trying to protect and promote the values and institutions that have made the United States the world's most successful experiment in self-government. I was proud to be a member of the judiciary as I watched colleagues in the federal and state courts deal with groundless challenges to the results of the presidential election in 2020. (I did not work on any of those cases.) Judges did what they were supposed to do, some in the face of substantial pressure, protecting the rule of law and the institutions of our democracy.[1]

The threats and pressures have not disappeared. Judges and lawyers need to continue to do our jobs, following the advice of historian Timothy Snyder in his 2017 book "On Tyranny: Twenty Lessons from the Twentieth Century."[2] His lessons include "Defend institutions" (Lesson 2), "Remember professional ethics" (Lesson 5), and "Believe in Truth" (Lesson 10).[3] I look forward to continuing that work as a senior judge.

B. Writing Opinions for Several Audiences

One way of explaining my thinking and writing is in terms of the different audiences. Judicial writing rarely provides a fun or easy read. It's usually dry, often complicated and precise, trying to mark its reasons and their limits. Each year I remind my clerks that people do not read what we write unless they are paid to read it. Even those paid readers are skeptical and impatient. We try hard to respect the readers' time and their reasons for reading an opinion.

In our common law system, the judicial opinion is central to the rule of law. The key features of the rule of law are public decisions, based on public records, with public explanations by neutral judges who are willing to apply known rules consistently to similarly situated parties. Judges' opinions provide those explanations, making the law knowable and predictable.

The audiences for our opinions are the parties and their lawyers, the trial judge or administrative agency whose decision is on review, colleagues on my own court, the Supreme Court, and colleagues on other courts as they decide similar cases, as well as other parties and their lawyers who may face similar

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1. *E.g.*, Trump v. Wis. Elections Comm'n, 506 F. Supp. 3d 620 (E.D. Wis. Dec. 12, 2020) (rejecting challenge to appointment of presidential electors in Wisconsin), *aff'd*, 983 F.3d 919 (7th Cir. Dec. 24, 2020). Note those dates of decision, too, with judges producing some of their best and most important work in a matter of days.

2. TIMOTHY SNYDER, ON TYRANNY: TWENTY LESSONS FROM THE TWENTIETH CENTURY (2017).

3. *Id.* at 22-25; 38-41; 26- 31.

cases, and the general public, which may include other lawyers and law professors, as well as interested citizens.

Judicial opinions exercise power whether they are well-reasoned or not, but I think of opinions primarily in terms of persuasion. The first audience is me. Through the process of writing and rewriting, my clerks and I are trying to put together an opinion that persuades us that we have the correct result in the case, relying on the best reasons that we would be willing to apply to similar cases. I then try to persuade different audiences of different things: the parties and their lawyers—especially the losing parties and lawyers—that they have been heard, understood, and judged fairly and with respect, even if they think the decision is wrong. I try to persuade trial judges that we have understood and respected their decisions, even if we have disagreed with some aspects of them.

I try to persuade my colleagues on the Seventh Circuit that the opinion addresses the facts and the legal issues fairly and reaches a careful result that is consistent with controlling precedent and the broader fabric of the law. I also try to persuade the Supreme Court, if anyone seeks review there, of the same things.

I try to persuade other courts that we have reached a sound decision for reasons they should consider adopting in similar cases. I also try to convince the larger legal community of lawyers and professors that we have reached the best solution for the legal issues and have followed fair procedures to reach it. In essence, each opinion is an exercise in modeling good lawyering and judging. For a broader public, I try to show readers that the decision is a good example of an imperfect and human legal system working as well as we can make it work, so that they can have confidence in that system.

C. Civility and Respect

I have seen civility in law attacked as a luxury of the powerful and privileged, as a tool for oppressing the powerless. I could not disagree more. It's basic to the rule of law. We use these processes and institutions to resolve disputes—peacefully. Consider the alternatives, from Thomas Hobbes' state of nature, where life is "nasty, brutish, and short,"[4] to "alternative dispute resolution" for businesses that cannot trust the rule of law—meetings between armed groups of "security consultants," as a friend saw in post-Soviet Russia. The powerless need access to effective legal institutions to protect them from abuses of power and privilege. To be effective, those institutions need the commitment of all sides, including a commitment to accept losses, just as we expect losing candidates to accept election losses.

I admire excellent writing by other judges and lawyers, such as the clarity, style, and flair in the opinions of Chief Justice Roberts and Justice Kagan. In recent years, however, I have also noticed an increase in judicial writing that grabs public attention by disrespecting the parties, their lawyers, the trial judge, or judicial colleagues who disagree with the author. As gratifying as the attention

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4. THOMAS HOBBES, LEVIATHAN 392 (Karl Schuhmann et al. eds., Bloomsbury Publishing 2006).

for the author might seem in the short term, each instance of un-civil judicial writing chips away at respect for the courts, their decisions, and the rule of law. After Judge Stephen Williams of the D.C. Circuit died in 2020, a tribute by one of his law clerks described his practice of "de-snarking" a dissent, a practice to emulate.[5]

His dissent was important enough to him to publish, but he was taking care to ensure that the disagreement remained professional and civil, with respect for colleagues and different views, without embedding corrosive and distracting personal attacks in the language.

In the privacy of my own office, I often draft language that does not deserve the light of day. Judges and lawyers feel those impulses, frustrations, and angers. We express them in draft opinions or in conversations with our staffs. But to keep legal institutions working, it's important that judges and lawyers get past those angry impulses and avoid the corrosive personal attacks on other legal actors. For a concise, thoughtful, and persuasive treatment of the problem, see Justice Boehm's dissenting opinion in *In re Wilkins*, where the Indiana Supreme Court imposed discipline for an attorney's harsh criticism of an appellate court in a brief.[6] Justice Boehm noted that the language of criticism being sanctioned was milder than some criticism of other Justices in separate opinions from the Supreme Court of United States.[7]

D. Writing Separately

Dissents and concurrences raise a special set of goals and concerns. The first question, of course, is whether to write one at all. If two colleagues see the case differently than I do, maybe they are right! We work on some hard problems, and my preferred solution may not be the best. As Judge Learned Hand famously wrote, "The spirit of liberty is the spirit which is not too sure that it is right. . . ."[8]

Where disagreements cannot be resolved and I'm on the short end of the vote, should I write separately? The answer depends on whether I have a good answer to the question, what's the point?

The best answer to that question is to try to persuade the Supreme Court or our en banc court, other circuits, or state courts not to follow the majority's view of the law.

There are sometimes other reasons to write separately. A colleague

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5. Nathaniel Zelinsky, *Stephen F. Williams: Personal Reflections by a Last Clerk*, YALE J. ON REGUL. (Aug. 10, 2020), https://www.yalejreg.com/nc/stephen-f-williams-personal-reflections-by-a-last-clerk/ [https://perma.cc/K5PT-K7AU].

6. 777 N.E.2d 714, 719-21 (Ind. 2002) (Boehm, J., dissenting).

7. *Id.* at 720. In the *Wilkins* case, the court later modified its judgment on rehearing, reducing a suspension from law practice to a reprimand. 782 N.E.2d 985 (Ind. 2003), *modifying* 777 N.E.2d 714 (Ind. 2002).

8. Judge Learned Hand, U.S. Ct. Appeals, Second Cir., The Spirit of Liberty, Address at the "I am an American Day" ceremony in N.Y.C. (May 21, 1944), *in* THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 144 (Irving Dillard ed., Vintage Books 1959) (1952).

introduced me to the term "shotgun concurrence," in the sense of riding shotgun for the majority. My first en banc opinion for the Seventh Circuit drew a dissenting opinion, and the issue was clearly going to be headed for Supreme Court review.[9] Judge Posner wrote a welcome "shotgun" concurrence that added some arguments against the arguments in the dissenting opinion.[10] A few years later, I wrote such a "shotgun concurrence" in another en banc case so that the majority opinion by Judge Flaum would not need to engage with all the arguments in the dissenting opinions.[11]

Some concurrences are intended to look beyond the specifics of the case and to raise broader issues for future litigation or legislative debate. A good example is a concurrence I wrote in *Berger v. NCAA*, where two college athletes wanted to be treated as employees of the university under the Fair Labor Standards Act and should be paid at least minimum wage for the time they spent practicing for and competing in their sport.[12] I agreed with Judge Kanne's opinion for the court affirming dismissal of those claims under what seemed to me sound and authoritative precedent.[13] Yet *Berger* was brought by track athletes (not a revenue sport) at an Ivy League university (which does not offer athletic scholarships).[14] My concurring opinion asked whether the reasoning of the precedents should also extend to athletes in Division I football and men's and women's basketball, where the financial stakes for athletes and coaches differ by at least an order of magnitude, and familiar concepts of amateur sports no longer fit comfortably.[15] I was not writing to offer a solution but to ask a difficult question.

III. INTO SOME WEEDS

I have not consciously brought to the bench a broad personal philosophy that distinguishes my work from that of other judges. Appellate judging is not supposed to be an adventure in personal innovation and creativity.

Still, I've formed some strong opinions on many issues all across the law. In some opinions in which I have taken the greatest professional pride, I've tried to make legal procedures work as smoothly as possible, so that disputes can be resolved as often as possible on the merits. That's how rights can be enforced and wrongs can be remedied.

Our adversarial system offers incentives for parties, lawyers, and judges to use various non-merits procedures, requirements, or issues to distract from the merits. Those procedures and requirements usually serve legitimate, even

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9. *See* Ind. Prot. & Advoc. Servs. v. Ind. Fam. & Soc. Servs. Admin., 603 F.3d 365 (7th Cir. 2010) (en banc), cert. denied, 563 U.S. 969 (2011).

10. *See id*. at 383-88 (Posner, J., concurring).

11. *See* Doe v. Elmbrook Sch. Dist., 687 F.3d 840, 857-61 (7th Cir. 2012) (en banc) (Hamilton, J., concurring).

12. 843 F.3d 285, 294 (7th Cir. 2016) (Hamilton, J., concurring).

13. *Id.*

14. *Id.*

15. *Id.*

important, interests. Common examples include appellate doctrines of waiver and forfeiture, statutes of limitation and repose, laches, and failure to exhaust administrative or state remedies.

But the incentives to stretch and even misuse them can be powerful, encouraging even desperate legal measures. It's the courts' job to follow those procedures and to enforce those non-merits requirements where appropriate, but also to abstain from misusing them. Here are some examples I'm proud of.

A. Sentencing

Sentencing is the toughest part of a district judge's job, and the sentencing hearing in the district court should be the main event. When I joined the Seventh Circuit, *United States v. Cunningham* instructed district judges to make sure that they addressed in sentencing the defendant's "principal arguments in mitigation."[16] If the judge failed to do so, the appellate court would vacate and remand for a better explanation, often a year or more after the original sentencing hearing.[17] Such appeals became very common. There was often room to argue about which arguments were "principal" and whether the district court had addressed them sufficiently.[18]

I worked with my colleagues to prevent the need for such frustrating and avoidable appeals, while still ensuring that district judges directly addressed the important issues on the record. We encouraged district judges, before they wrapped up a sentencing hearing, to simply ask counsel whether the judge had addressed sufficiently all the major arguments in mitigation.[19] If the defense is satisfied, a *Cunningham* argument will be deemed waived.[20] If the defense is not satisfied, the problem can be fixed on the spot, in the district court, when everyone is focused on the case and the issue.[21] That fix has worked well.

In another series of cases beginning in early 2015, the Seventh Circuit began finding reversible "plain error" in district courts' handling of many common conditions of supervised release.[22] Those cases focused a new light on often-neglected terms of a criminal sentence. (At most federal sentencings, the only

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16. 429 F.3d 673, 679-80 (7th Cir. 2005).

17. *See id*. at 680.

18. *See* United States v. Castaldi, 743 F.3d 589, 595 (7th Cir. 2014) (stating that as of February 19, 2014, the Seventh Circuit "had cited *Cunningham* in 197 later opinions and orders," almost all concerning this issue).

19. United States v. Garcia-Segura, 717 F.3d 566, 569 (7th Cir. 2013) (Flaum, J.) ("In order to ensure that defendants feel that they have had such arguments in mitigation addressed by the court and to aid appellate review, after imposing sentence but before advising the defendant of his right to appeal, we encourage sentencing courts to inquire of defense counsel whether they are satisfied that the court has addressed their main arguments in mitigation.").

20. United States v. Donelli, 747 F.3d 936, 941 (7th Cir. 2014) (enforcing waiver).

21. *Id.*

22. *See, e.g.*, United States v. Thompson, 777 F.3d 368 (7th Cir. 2015). *Thompson* was followed in *United States v. Kappes*, 782 F.3d 828 (7th Cir. 2015).

term the defendant cares about is the length of a prison term, not the details of supervision he may experience years or decades later.) In the *Thompson-Kappes* line of cases, our court imposed new substantive limits and procedural requirements for conditions of supervised release. In doing so, however, we often considered both procedural and vagueness challenges to conditions that had been adopted routinely and without objection. Whatever the substantive merits of these decisions, the willingness to reverse on grounds that could and should have been raised in the district court was aggravating, to put it mildly, for district judges and some members of the circuit.

My colleagues and I were able to propose and then implement a procedural fix for these problems.[23] The district judge simply asks the defense to state on the record (a) whether the defendant has personally reviewed with his lawyer all of the proposed conditions of supervised release and (b) whether there is any objection to them or (c) a need for further explanation of the reasons for imposing them. If there is a problem, it can be addressed on the spot. If not, the issues are waived for appeal, as explained in Judge St. Eve's opinion for the court in *Flores* and its progeny.[24]

This procedural fix has been effective in avoiding unnecessary appeals while still ensuring that defendants have a fair opportunity to raise these issues at sentencing. If real problems emerge later during supervision, the conditions can always be modified.[25]

A third example from sentencing concerns the Sentencing Guidelines. They have been deemed advisory since *United States v. Booker*,[26] but the district court must still calculate the applicable Guidelines along the way to imposing a sentence that is "sufficient, but not greater than necessary, to comply with the purposes" of sentencing set forth in 18 U.S.C. § 3553(a). The Guidelines were designed to reduce arbitrary sentencing disparities, and they have had that effect compared to prior law. A year or two of experience with the Sentencing Guidelines will teach a judge or lawyer, though, that they have buried in their details many features that can lead to arbitrary and sometimes dramatic differences in outcome, especially in calculating criminal history. Such guideline issues may have little or nothing to do with the purposes of sentencing under § 3553(a).

The blessing of *Booker*, at least for a district judge, is that she does not need to let such arbitrary issues drive the final sentence. The judge must consider the Guidelines but is not required to follow them, and often, in my view, should not follow them. Accordingly, in a series of opinions over the years, I have repeatedly urged district judges facing difficult and arbitrary questions under the Guidelines

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23. *See, e.g.*, United States v. Flores, 929 F.3d 443, 448-51, 450 n.1 (7th Cir. 2019) (explaining waiver and noting that opinion had been circulated under Circuit Rule 40(e) to reconcile conflicts in circuit precedents); United States v. Lewis, 823 F.3d 1075, 1081-82 (7th Cir. 2016) (laying foundation for waiver rule adopted in *Flores*).

24. *Flores*, 929 F.3d at 449-50.

25. 18 U.S.C. § 3583(e).

26. 543 U.S. 220, 245-46 (2005).

to consider, explicitly and on the record, whether the answers to those questions make a difference in their final sentencing decisions.[27] In one case, I went so far as to urge district judges to ask in so many words, "Why should I care?"[28] These opinions are consistent with many authored by other judges, but I've been particularly enthusiastic and persistent. If a judge makes clear that she has actually considered the guideline question, rather than just incanting a few routine phrases to insulate the sentence on appeal, my colleagues and I will respect that judgment rather than wrestle to the ground trivial or arbitrary guideline questions.

B. Civil Procedure and Pleading

I joined the Seventh Circuit a few months after the Supreme Court turned civil pleading upside down in *Ashcroft v. Iqbal*, which left behind the notice pleading adopted in the Federal Rules of Civil Procedure in 1938.[29] The new *Iqbal* pleading standard, especially for complaints, created widespread uncertainty and confusion. It was difficult to predict the level of factual detail any given district judge might demand to allow a claim to survive a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).[30]

In a dissent in *McCauley v. City of Chicago* and in a series of opinions for the court in other cases, I offered suggestions for coping fairly with the confusion caused by *Iqbal*. Most important, district judges need to be liberal with opportunities to amend pleadings found to be insufficient in the district judge's view of *Iqbal*'s requirements.[31] Most district judges in the Seventh Circuit are now applying that approach in most cases. Judges may still deny leave to amend based on undue delay and/or futility, but most have followed these precedents to ensure that plaintiffs have a fair opportunity to meet the uncertain *Iqbal* standard.

C. Class Actions

The advantages and disadvantages of class actions have been the subject of extensive debate that continues today. Members of Congress, lobbyists and their clients, lawyers and their clients, and judges seek to expand or restrict their use. I have seen my job as enforcing the rules and the precedents in effect for the cases before me, whether the result was to expand or restrict class actions. No appellate judge can accomplish anything alone, and a couple of these episodes illustrate

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27. *E.g.*, United States v. Campbell, 37 F.4th 1345, 1353 (7th Cir. 2022); United States v. Snyder, 865 F.3d 490, 500-01 (7th Cir. 2017); United States v. Bloom, 846 F.3d 243, 257 (7th Cir. 2017); United States v. Harris, 718 F.3d 698, 705-06 (7th Cir. 2013); United States v. Vrdolyak, 593 F.3d 676, 684-92 (7th Cir. 2010) (Hamilton, J., dissenting).

28. United States v. Marks, 864 F.3d 575, 576 (7th Cir. 2017).

29. 556 U.S. 662 (2009).

30. *See* McCauley v. City of Chicago, 671 F.3d 611, 620–29 (7th Cir. 2011) (Hamilton, J., dissenting in part).

31. Bausch v. Stryker Corp., 630 F.3d 546, 559-62 (7th Cir. 2010); Luevano v. Wal-Mart Stores, Inc., 722 F.3d 1014, 1024 (7th Cir. 2013); Runnion v. Girl Scouts of Greater Chi. & Nw. Ind., 786 F.3d 510, 518 (7th Cir. 2015).

cooperative efforts with colleagues to improve the law and solve problems.

One example was the expansion (or creation) of the so-called "ascertainability" requirement for class certification. A few years ago, some decisions in other circuits and district courts raised the bar for ascertainability, i.e., for proof of who is a member of the proposed plaintiff class. Some courts raised the bar so high that they made many consumer class actions difficult or impossible, especially for claims based on low-cost products and services. The issue came before our court in *Mullins v. Direct Digital, LLC*.[32] My opinion tried to explain why those cases on ascertainability had reached beyond the requirements of Rule 23 and distorted the balance struck in Rule 23.[33] Since *Mullins* was issued, its view of ascertainability seems to have taken hold. It's never easy to pursue a plaintiffs' class action, but ascertainability should not be a high hurdle to clear.

Another example of class action problems arose in *In re Stericycle Securities Litigation*, where we vacated an excessive fee award.[34] Much of the opinion reinforces well-established Seventh Circuit law on trying to replicate or imitate the results of a genuine market choice in hiring class counsel.[35] Along the way, we also helped open the door for discovery of political contributions by class counsel to public officials who are in a position to influence the choice of class counsel, especially by the public retirement funds that are often the lead plaintiffs in securities cases.[36] (Their leading roles are a perhaps unexpected side effect of the Private Securities Litigation Reform Act of 1995.[37])

In the class action world, another persistent problem has been the use of nuisance objections to proposed settlements. These objections are too often used to extort money from class counsel and the class. The judiciary's Advisory Committee on Rules of Civil Procedure and the Standing Rules Committee took significant steps toward a solution with the 2018 amendments to Rule 23, in particular Rule 23(e)(5).[38] I wrote for another panel that adopted steps toward a solution for nuisance appeals from class settlements, in *Pearson v. Target Corp*.[39] We applied the logic of a 1945 Supreme Court decision to impose on objectors a fiduciary duty to the class, so that any money paid to an objector to resolve an objection would belong to the class, effectively prohibiting profit from attempted "objector blackmail."[40] It remains to be seen whether the rule amendments and the *Pearson* opinion will help discourage such nuisance objections.

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32. 795 F.3d 654 (7th Cir. 2015).

33. *Id.* at 658.

34. 35 F.4th 555, 558 (7th Cir. 2022).

35. *Id.* at 559-67.

36. *Id.* at 569-72.

37. *See* Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

38. *See* FED. R. CIV. P. 23(e)(5) advisory committee's note to 2018 amendment.

39. 968 F.3d 827 (7th Cir. 2020).

40. *Id.* at 829.

D. Multidistrict Litigation

Multidistrict litigation ("MDL") under 28 U.S.C. § 1407 is the principal mechanism for managing many of the biggest, most challenging, and most complex disputes in the federal courts. The vast bulk of that work is handled by district judges selected to do so by the Judicial Panel on Multidistrict Litigation.[41] As a district judge, I handled one MDL, and that gave me the opportunity to learn something about the excellent and often creative problem-solving work done by so many district judges.[42]

Appeals from MDL decisions are relatively unusual, and they can be challenging because particular appeals often let appellate courts see only a tiny slice of the larger MDL. The appellate courts' role with MDLs is to ensure legal rights and duties are not thrown overboard in the interests of pragmatism, but to leave as much room as reasonably possible for the district judges to do their stuff and see those huge cases toward resolution. I've had a few chances to do that, with *FedEx Ground Package System, Inc. v. U.S. Judicial Panel on Multidistrict Litigation*,[43] *Bell v. Publix Super Markets, Inc.*,[44] *Looper v. Cook Inc.*[45]

The cases I've discussed reflect some of my best work on behalf of the court. I've deliberately steered away from dissenting opinions, though I think I've done some of my best work in dissents. (Some of those have found fertile ground, and others have not.) I could go on at considerable length with many other areas of law, including employment discrimination,[46] the Americans with Disabilities Act,[47] habeas corpus, enforcement of constitutional rights using 42 U.S.C. § 1983 and *Bivens*,[48] antitrust law, prison health care, statutory interpretation,[49] consumer

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41. *See* 28 U.S.C. § 1407.

42. The MDL I handled addressed the scope of property rights for railroads, adjoining landowners, and the federal government along railroad rights-of-way created under 19th-century statutes used to promote construction of railroads in the American West. The cases in that MDL called for few substantive legal decisions, but they did produce the felicitously named *Home on the Range v. AT&T Corp*., 386 F. Supp. 2d 999 (S.D. Ind. 2005).

43. 662 F.3d 887, 889 (7th Cir. 2011) (denying writ of mandamus and deferring to district court's management of structure of appeals).

44. 982 F.3d 468, 488-89 (7th Cir. 2020) (enforcing complex rules for finality and appealability arising from MDLs).

45. 20 F.4th 387, 390-91 (7th Cir. 2021) (addressing issues posed by "direct filing" procedures in MDLs).

46. *See, e.g.*, Coleman v. Donahoe, 667 F.3d 835 (7th Cir. 2012); McKinney v. Off. of Sheriff of Whitley Cnty., 866 F.3d 803 (7th Cir. 2017); Joll v. Valparaiso Cmty. Schs., 953 F.3d 923 (7th Cir. 2020).

47. *See, e.g.*, Eckles v. Consol. Rail Corp., 890 F. Supp. 1391 (S.D. Ind. 1995), *aff'd*, 94 F.3d 1041 (7th Cir. 1996); Nicholas v. Acuity Lighting Grp., Inc., No. 1:03CV1005, 2005 WL 280341 (S.D. Ind. Jan. 4, 2005); Miller v. Ill. Dep't of Transp., 643 F.3d 190 (7th Cir. 2011); Tate v. Dart, 51 F.4th 789 (7th Cir. 2022).

48. *See, e.g.*, Shields v. Ill. Dep't of Corr., 746 F.3d 782 (7th Cir. 2014); Daniel v. Cook Cnty., 833 F.3d 728 (7th Cir. 2016); Bradley v. Vill. of Univ. Park, 929 F.3d 875 (7th Cir. 2019); Hildreth

protection statutes and the federal False Claims Act, religion in public life, administrative law, substantive criminal law, Fourth Amendment issues, and so on. I hope lawyers and judges interested in those areas find useful opinions, and I hope that I'll continue to contribute to the law in many areas for the foreseeable future. Again, my thanks to so many for the effort that went into these essays.

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v. Butler, 960 F.3d 420, 432 (7th Cir. 2020) (Hamilton, J., dissenting).

49. *See, e.g.*, Schutte v. Ciox Health, LLC, 28 F.4th 850, 862-63 (7th Cir. 2022); Kleber v. CareFusion Corp., 914 F.3d 480, 489-508 (7th Cir. 2019) (en banc) (Hamilton, J., dissenting).