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PAIGE V. BUTLER: Your moderator for this session is Ben Tennille. He is on the North Carolina Business Court. He was actually the only business court judge for many years in North Carolina. He was appointed in 1996 and I believe it was not until 2005 that you had company?

JUDGE TENNILLE: Yes.

PAIGE V. BUTLER: He’s also was the founder and the first president of the American College of Business Court Judges. He has served in many capacities for the ABA in the business law section as a representative for the judiciary.

JUDGE TENNILLE: Thank you, Paige. You’re here for the grand finale—this spectacular panel that’s been put together. We’re sorry Fidelma couldn’t be here. Rumor has it she couldn’t find a responsible defendant to charge with the snow in Buffalo. But she is seated at the airport working on a class action against TSA, the air traffic controllers association, and the major airlines, alleging that collectively they constitute a public nuisance. We won’t miss her but John Vail is going to take her place very admirably.

We do have an all-star panel. To my immediate left is Phil Howard who is the founder of Common Good. A lawyer with Covington & Burling, he has written a number of books, starting with the “Death of Common Sense: How Law is Suffocating America.” His last book is “Life Without Lawyers: Liberating America from Too Much Law.” We’re going to have a very short video of Phil’s appearance on the Daily Show here shortly.

John Heintz is a partner with Dickstein & Shapiro, he’s a leading litigator in both corporate insurance coverage and complex litigation.

Robert Cusumano who’s the General Counsel of ACE Limited, which is a global insurance and re-insurance company. If we think we have problems dealing with risk everyday, they couldn’t possibly compare to what Bob has to do on a daily basis as far as risk is concerned. I’m going to take the moderator’s prerogative just to make a few comments at the outset here. I am a business court judge. I spend the majority of my time on corporate governance and as such, I have a very fortunate position in the judiciary. The field I work in, corporate governance, encourages risk on the part of directors and officers of a company. There is no value creation without risk.
I have the benefit of the business judgment rule, which restricts the scope of my review of either the inaction by, or the decisions of the boards of directors. Everyone in my court knows and generally agrees that I have the power to allocate risk. The allocation of risk is almost always in a contextually specific situation but I have well developed standards and guidelines, primarily from the Delaware Supreme Court, to help me. I get to look at process information, transparency, motivation, culture, and history, in reviewing the decisions of boards of directors that may have gone awry. I generally have good lawyers and well qualified experts to help me.

The result is a system that provides as much certainty as possible to the business world with respect to the corporate governance issues with which I deal. I am absolutely convinced that those of you in the audience who have to deal with other kinds of risk allocation are not so fortunate. So, we have this panel put together to give us their views of the big picture questions in the role of the civil justice system and allocating societal risk. To borrow a phrase from Larry Ribstein, this is what I would call “big law.”

PHILIP K. HOWARD: Picking up on what Ben started out with, risk, I’d like to talk about what I think is a fundamental shift in the goals of civil justice needed to be one of the elements to put our society back on an even keel.

I’ll start by saying civil justice is extraordinarily important in a free society. When you have an anonymous interdependent society where people can’t count on community norms, you need a system of justice that Americans trust, to enforce contracts and to hold people accountable if they act unreasonably so that people can go through the day following their star and not worrying about protecting themselves.

We need incentives for people to make sure they stop for the red lights and also that they will, when they’re making products, comply with reasonable safety norms and that sort of thing. Now, civil justice happens to be the mechanism by which we make those choices but we’ve been trained to think that civil justice is just a dispute resolution mechanism, and I submit that’s not the case. Its main goal is actually to be a part of a platform for a free society. It’s to enable people to make all these daily choices because again, the backdrop here is this reliable civil justice system that people can trust to enforce their contracts, and so on.

Now, if justice is not available, and big companies can get away with anything, or people can be abusive in their treatment of workers, then that undermines freedom because people are very nervous in their daily dealings because they’re afraid they’re going to be taken advantage of. But the similar effect occurs if justice is over inclusive. If any accident, if any disagreement in the workplace can have a similar effect, and you can be dragged into litigation for years, then similarly, people in their daily choices won’t focus on doing the right thing, they focus on self protection.

They start listening to that little lawyer on their shoulders—and this is a lot of what’s happened in modern society. The culture of healthcare has
been transformed in the last fifty years. I have a pediatrician friend of mine who used to be head of a medical association who said, “I don’t deal with patients the same way anymore—you wouldn’t want to say something off the cuff that might be used against you.” Imagine going through the day as a pediatrician thinking that. How that affects your patient relations.

It’s not just the cultural aspect. Defensive medicine is actually very hard to measure; the reliable estimates have it at between $50 and $200 billion dollars a year, which is a huge amount of money. That’s just the practice of doctors: ordering tests that they don’t think are medically indicated because they want to have something in the record in the unlikely event that the headache is a tumor or the like. The trial lawyers say that the civil justice system today is good because it makes us be careful. Well, that’s been studied by the Institute of Medicine. It turns out that is not to the case.

There’s distrust of justice in medical care because it has chilled the professional interaction needed for safe care; so doctors and nurses don’t say things like, “Are you sure that’s the right dosage?” “Are you sure that’s the right prescription?” because they don’t want to take legal responsibility. This has been studied. So, it doesn’t work—the current cultural system of fear and distrust of justice doesn’t work for society. Children’s play has been completely transformed—that’s nothing left in playgrounds for a kid over the age of five: no seesaws, merry-go-rounds, jungle gyms, or climbing ropes.

Broward County, Florida, a few years ago, banned running at recess. Other schools have banned the game of tag because all of those activities not only involve risk, but the certainty that from time to time there, will be accidents. And when there’s an accident in modern America, there’s a lawsuit. Nobody’s drawing the line on behalf of society whether that was a reasonable risk or not. So, the lawsuit goes on. Broward County banned running because it had 186 claims in the prior five years. They had to settle every one of them. They couldn’t afford to go through the court process for years.

We have a crisis of childhood obesity which has many causes but one of them, according to the Center for Disease Control, is that kids don’t do what they used to do and part of that is because they’re not allowed to. Relations in the workplace have completely been transformed. Businesses, including my law firms, don’t give job references anymore. I have a list of questions I’m not allowed to ask interviewees, including this one, which is bulging with innuendo, “Where are you from?”

You have this society where you have warning labels on everything: “Remove baby before folding stroller.” My favorite, a five inch fishing lure—it’s a big fishing lure—with a three prong hook in the back said, “Caution: harmful if swallowed.” You have people putting all these warning labels on things that are not neutral—they’re counterproductive. It’s just like the boy who cried wolf: you need warnings for the things you need
warnings on, but you shouldn’t put them on things you don’t need. But we
don’t have anybody drawing that line anymore.

What I submit is, that it is wrong that nobody on behalf of society has
the authority to draw the lines of what is a reasonable risk or not; what is a
reasonable lawsuit; and what is a reasonable defense or not. We have this
idea that civil litigation is a right. There’s a right to sue just like the First
Amendment. I submit that that’s wrong—that suing is a use of state power,
coming down to that verdict when the jury holds you guilty and the marshal
will come and take your home away. It’s just like indicting somebody—
you’re just indicting them for money.

We would never tolerate a prosecutor seeking the death penalty for a
misdemeanor, so why do we tolerate some jerk in the District of Columbia
suing his dry cleaners for $54 million dollars for a lost pair of pants? Com-
pletely absurd. The case went on for two years. The judge could have dis-
missed it in a minute—case dismissed without prejudice to refiling in small
claims court. But the superior court judge in the District of Columbia
didn’t think he had that power because that’s not what judges think they
have the job to do anymore.

If one person brings a lawsuit because their child fell off the seesaw, it
doesn’t matter what the jury does—the juries are generally sensible. The
fact that you’re at risk and you might get sued for $50,000, or millions of
dollars if a child happens to die, means that all of society will rip out the
seesaws, which is what’s happened because, why take that risk? How do
you accomplish goals? How do you accomplish the goal of always keeping
the courthouse door open? Which it should be—there’s no rule that’s going
to arbitrarily shut a courthouse door for anybody.

It must be open, the question is how long the case is allowed to last,
not let any disagreement, no matter how unreasonable, proceed all the way
through to a jury trial. Where the British Law Lords said, “In a common
law system, it is the job of judges to defend the freedoms of society,” in that
case, a person who suffered a tragic accident, paralyzed for life while
swimming in a public lake, the case was dismissed because looking at the
facts the Law Lords said, “As a matter of law, if we let claims like this pro-
ceed, the lakes and rivers in our country will be closed down because peo-
ple won’t take the risk.”

It’s the job of judges to draw the boundaries to defend the freedoms of
everyone else in society. If you go back and read Justice Holmes, and Jus-
tice Cardozo, and Justice Trainer, they said the same thing we’ve just for-
gotten—Trainer said the same thing. If a lawsuit might affect the conduct
not in the courtroom, I submit judges have to make legal rulings drawing
the contours of the claim.

Otherwise, everything that involves a risk is potentially illegal, as one
scholar put it, “and act as illegal if it is vulnerable to legal action.” So it’s
the risk that you might get sued from an activity that undermines every-
one’s freedom, and that’s what’s happened in our society. H.L.A. Hart, the
famous legal philosopher, once said that the essential characteristic of every system of justice that we respect is this: like cases must be decided alike.

In our zest to provide justice to everyone—and there are a lot of things that we’ve had to overcome and abuses that we had to overcome in our lifetimes—we’ve lost sight of the fact that freedom not only means access for people to bring claims, but also requires the institutions of society, such as judges and others to make common choices about which other people could disagree. This has been surveyed area after area. Americans no longer trust the civil justice system, and it’s materially undermining their freedom.

An essential aspect of restoring that freedom is for judges to take back control of the courtroom, and start making legal rulings—nothing unconstitutional about this. The role of juries in civil cases is to decide disputed issues of fact, not to make rulings on behalf of society. They don’t have that power. That’s one of the aspects of reform that my group, Common Good, has been working with some of the senior judges, the American Law Institute, and others, about pursuing. Thank you very much.

**JUDGE TENNILLE:** Thank you Phil. Here’s John Heintz.

**JOHN E. HEINTZ:** Thank you. I learned earlier today that I’m one of the walking dead, and now I’m participating in a system that has gone awry. I want to talk a little bit about how we use the civil justice system to address this transfer of risks, because everything that happens in the system is affecting whether a risk that somebody bears is being transferred to somebody else through property rights, through property rights, through tort rights, or through contract rights. These are all areas through which our society transfers risk. Tort law defines who has the risk of unreasonable behavior and who has to compensate for the consequences of that.

Insurance, which is my area of the law, is the ultimate mechanism of the transfer of risk because that is the business’s purpose. It’s behind along side of, or, instead of these other mechanisms. But to me, it’s really the legal system’s definitions of rights and definition of what constitutes an interest—an invasion of that right that is subject to being remedied in a court of law. Everything that we litigate about is over, “Do I have the right and do I have a right to be compensated or given relief if that right is interfered with?” Every argument we have in the public domain, every argument we have in court, is somehow infused with that basic question.

Because the heading of our topic is societal risks, I want to distinguish the garden variety, although I think a very cogent argument has just been given about how even a simple slip and fall case off of a merry-go-round has a societal element to it, because the ruling has consequences that can be widespread. Many of the risks that we are dealing with in these kind of cases, are the risks of a hundred or more years of an industrial society engaging in the kind of economic activity that this country pursued, and doing
so in a way that created harmful side effects, and the question is how do we now allocate the burden of those risks?

There are some areas where we are allocating the burden of those risks that are only historical because the activity giving rise to the problem has long ago ceased. The use of asbestos in insulation material ended some time ago, but we’re still allocating the current consequences of that historical conduct. On the other hand, in the climate change litigation, we’re trying to allocate the risk not only of past conduct but of current conduct, and if emitters of CO2 are held liable in court then they will change their behavior in response to that allocation of risk to them.

But it is different than simply dealing with the legacy of a historical area of conduct, because we are not really—when we’re dealing now with asbestos—creating incentives about future behavior except by way of perhaps, example. Early on in my career, I went to the 8th Circuit for an en banc rehearing on an insurance coverage dispute, and the first question that Judge McMillan raised was, “How is it fair to ask an insurance company that sold you a policy in 1972 to pay a liability that arose under a statute that was not passed until 1982?” The question of fairness.

It seems to me that fairness is a principle that every lawyer, every public policy advocate in support of his or her position, and every judge has to grapple with—it infuses our civil justice system. So, one has to ask in the context of dealing with these mass torts or these global warming problems or other comparable problems, “Is our civil justice system handling this efficiently and is it fair?” Well, I don’t think anybody who has had any experience in the asbestos world would say that that system has been either efficient or fair.

They ran studies suggesting that less than half of the total cost of dealing with asbestos related claims ultimately gets into the hands of asbestos claimants—of course, not all those asbestos claimants who get paid had an impairment—getting a real fraction of every dollar went to people who really had injury. Well, that’s certainly not efficient. Is it fair? I think it depends on which state you’re in, which lawyer you hire, and who’s lawyer is on the other side, and—we heard yesterday—that one of the single most important factors affecting the settlement of the case, is the jury pool. That has a dramatic affect on what the value of a case is.

If you’re talking about a system whose objective is to treat similarly situated people in a similar way, that is not a recipe to accomplish that in a mass tort problem of that sort. But fairness is, it seems to me, the important thing that drives the proposition that Phil put to you, and that I think every speaker I’ve heard today and yesterday put to you. Because we will all argue fairness. Is it fair that a young woman with cervical cancer allegedly caused by the DES her mother took to prevent miscarriage, is deprived of relief because her mother was given the drug in the hospital in a paper cup, and therefore did not know which manufacturer made the drug? Is it fair?
Is it fair that a paper company that recycled paper, that’s the whole source of its paper stock, but didn’t know that some of that recycled paper was carbonless copy paper that contained PCB’s on the backside in which the ink was suspended, didn’t know it was discharging PCB’s into the river, should pay for the cost of cleaning up the PCB’s thirty-five, forty years later? Is it fair? Is it fair to hold a company that is admittedly a substantial emitter of CO2 for having made hurricanes more severe in Louisiana, and therefore should somehow compensate or abate the nuisance it created because it is within twenty or thirty or fifty miles of the New Orleans where the hurricane hit?

Every litigator, every person who is representing one side or the other of those interests is arguing about whether it’s fair. Fairness indeed governs the principles we have to reflect upon and in your jurisprudence make decisions on. We start with principles that are in the Declaration of Independence, The Bill of Rights, the 14th Amendment; all of those have concepts of fairness in them. But standing—the articulation of that test is a fairness test. Is the injury the plaintiff complains of fairly traceable to the actions of the defendant before the court? And if I ask the defendant to do what you are asking me to do, if I make them do that, will it remedy your injury?

That’s a question, ultimately, of fairness. Our tests of causation are questions of fairness. A but-for test. Be it in the [inaudible] the problem of course was that the plaintiff couldn’t [inaudible] by traditional tests. So, her lawyer argued it’s not fair. California Supreme Court included that that’s why we would adopt market share liability, that we knew that six companies manufactured this drug, it had to be one of the six.

If we allocate the liability in accordance to market share over the course of all the cases, it will be a fair imposition of the transfer of risk from the individuals who end up with cervical cancer to all six of the companies whose drugs in the aggregate contributed proportionately to all the cervical cancers. That was a fairness driven result. The question I think that is the most challenging in a very complex society is how do you address fairness in dealing with the known—knowable as well as the unknowable—risks of a very complex industrial society in which we live? And of course that I leave to you all.

**Robert Cusumano:** I’m so pleased to be a part of this wonderful panel at this wonderful conference. As many of you have noticed probably, I’ve been here throughout the whole conference and that has caused me to rip up all my notes that I started with and try to reframe my thoughts in the context of what I’ve heard so far. I’ll start with a metaphor. I feel that about thirty years ago I married the civil justice system and maybe we can characterize my remarks as an attempt to get some therapy. In order to get some therapy, first, we have to emote a little.
I’m going to have to tell you a little about myself, and then I have to talk about what we might do to make our marriage better. Always, you start therapy by telling your spouse, “I love you very much. You’re good at almost everything. You’re very functional, the kids are getting raised well. A lot of our problems are in a place that doesn’t involve day to day life.” And I think everything I’ve heard in the last two days works along those lines.

But I also feel bad. I feel bad for you, the judges, because you need to decide practical things every day with real people banging the table for what we call justice, this intangible good. You’re doing it within a basic existential conflict in America about democracy and the role of the courts. And you’ve heard that conflict from both sides, maybe all sides, of a multidimensional, political battle that’s going on, one that has to do with the very role of courts in allocating societal risk. That debate, if that’s what it is, goes forward with the benefit or detriment of some very incoherent faux political philosophies, and we’ve heard a little bit of that in my opinion over the last couple of days as well. And the debate always goes forward, now, in a highly politicized environment in which the courts themselves are political footballs.

The result is that for you, the judges, and a little bit for me as general counsel of a major insurance company, we have become the dumping ground for unanswerable questions. We are the pooper scoopers of society. As the general counsel of a global insurance company, I may scoop more poop than all of you combined. The result is that I’m not an ideologue—I’m probably the least wedded to any philosophical point of view of anybody you’ve heard over the two days, other than perhaps on this panel.

I would say that my point of view, which will color the rest of my comments in this request for therapy, is vaguely meritocratic, centrist, capitalist. I’m a social liberal; I tend to be pragmatic; I’m a little oriented toward making things work in the real world; I like to get things done; I like to solve problems. I take complicated legal or judicial situations and try to reduce them to a single number. The result of this is that it tends to focus one’s attention on systemic issues, on the way we do business in the civil justice system. I preside over, or I certainly have an affect on, the movement of some billions of dollars every year from our coffers into the hands of plaintiffs in lawsuits.

My job, honestly, touches often on every single issue that people talked about through this whole couple of days. I don’t represent any particular ideology about those things, but I do feel like I represent the financial plumbing. It is here where the poop goes after the pooper scoopers are finished, and we try to deal with it and disperse it and make it less toxic. In the world that plumbing is not quite as extensive as you might think it is—the entire capitalization of the worldwide insurance industry is about $300 billion to $500 billion. That’s in the whole world, and you might estimate that that’s somewhat less than just the global warming tort would cost.
My company has between 5% and 10% of that. There are reserves for existing claims, mostly what you all do for a living everyday—in the workman’s compensation area, auto accidents, everyday insurance, real people suing real people. Those reserves probably approximate a little more than the global capital of the industry. That compares, not favorably, to a one year budget for the federal government—it’s less than half. Since World War II—I ask for any guesses from the audience: for the worldwide insurance industry, if you have premiums on your left hand, and you have claim payments on your right hand, what’s the relationship between the two?

I think most people would think, “Well, there’s some profit margin, maybe it’s not a huge amount but there’s something.” That relationship is actually negative. Our business model works on making money while we hold it. We as an industry have almost always, and almost every year, paid more in claims than we collected in premiums. It is a fiduciary investment model, and I consider myself a fiduciary to the world. I have to manage the allocation of the money to all the things that are delivered through the civil justice system.

I find that system to be haphazard, chaotic, mostly effective, vaguely unfair, and occasionally very unfair.

It’s part of my job to rationalize outcomes, and I have some power to do that, but it’s the power of influence; it is not the power to decide anything. Contrary to what you may believe about insurance companies and lawyers in them, we don’t hate torts or the tort system. We like it, it is our lifeblood. We manage it for a chance at a profit. What we hate is a tort system that delivers retroactive liabilities that no one could have understood at the time we collected premiums for those liabilities. And we hate that with a truly blinding passion.

In my therapy session, I would tell my lovely spouse, the civil justice system, three things about our relationship and about us. One is that the failure of the political process—that is, the refusal of the political branches to make clear and final decisions about the “allocation of societal risk”—is at the heart of our problem. I believe that it is inevitable that when the credible political institutions don’t decide something, someone else is going to decide for them. And I think that that is the common theme throughout this whole couple of days: You and I are going to decide these things because of a political vacuum.

I decide them by writing insurance coverages, deciding what’s going to be covered and what can’t be covered, finding exclusions to deal with whatever’s delivered to me—particularly things that I can’t underwrite or that actuaries can’t understand. I also get to choose when and how hard to litigate. That is a very big and influential factor, and when you see an insurance company, as they say, “litigating like hell,” you can count on the fact that you touched a nerve, because we would rather just process claims through the system. Sometimes we can’t do that.
I also participate in claim handling decisions. That is, where there’s an ambiguity and you’re not sure how the facts fit into a policy, I can decide, with my colleagues, to pay that claim anyway, or not to. That’s power. Those are all default powers given to me because no one else is going to decide these things.

Think about the example of so-called “death panels,” so much discussed in a very unfair way a year ago or so. If the idea is that we’re concerned about governments deciding who gets what kind of care or not, especially at the end of life, especially with new technologies—and the concern is government specifically—then that concern has to be informed by the following fact: if they don’t decide it, I decide it. I don’t think Sarah Palin or anybody else wants me doing this, but I have to do it. That’s the default—that’s the job of the pooper scooper. If I don’t do it, then no one does. So I do it.

Yes, I have all of you overseeing my decisions, and I try to make rational decisions—in part for that reason, in part for my own reasons. But someone will in fact decide these things. So, to decide that the law articulated by democratic processes has no role in something is not to say nothing gets done; it is simply to move the decision point to another actor. It’s critically important that everyone understands that, and the fact that those non-statutory decision paths have very different characteristics.

When these non-statutory decision makers (or processes) are funded by what I’ll call “externalities,” that is, by other people’s money (OPM), I find that all hell breaks loose. Every panel through these two days has dealt with an externality—and a big one—and it’s always at the center of their problem. Externalities cause bad incentives. And these externalities lead to decision-making by institutions that are not competent, frankly, to make those decisions, including me and my company. We have juries making scientific decisions, we have judges, as you heard, making information technology decisions, we have me making strategic resource deployment decisions. And, of course, we have self-interested lawyers making decisions about everything.

As a result, you have a certain failure of basic cognitive abilities: you have a problem with judgment, you have decisions being made that are not as fully informed as they would be if we were taking in the expertise of everyone in the way you would in a fully functioning political process.

When legal outcomes are driven by the supply of money, rather than by other things—as we must all admit they often are, especially when we have deep-pocket defendants—you lose sight of justice or rationality. And then that feeds on itself. The result of that is under-funded courts, as courts rush through and try to get claims paid, become ineffective at what they are fundamentally designed to do, that is, deliver just outcomes. What they’re doing, actually, is in a sense undermining their social purpose.

The second thing in my therapy session that I would say is that we have to get past “wrongdoing.” I agree with everything John just said about
the search for justice and fairness. But frankly, we’re in a world of complexity where old notions of justice and fairness don’t make any sense anymore. We’re in a postmodern world of enormous complexity, and the result of that is that you can’t sit down very often in these gigantic new tort environments and come up with gut justice. And if you did come up with gut justice, what you would be doing is supplanting a societal decision that we’re not going to tax our people to solve a social problem with a judicial decision that we’re going to collect money, probably from me and from companies, as another way to solve that problem less well.

So, the movement away from wrongdoing in torts, including the whole strict liability concept itself, I applaud, because we’re not dealing with wrongdoing. We’re dealing with social allocation of responsibility. I would rather see it done at the political level, but if we’re going to do it in the context of the relationship between courts and litigants, then we have to do it in a way that is, quite simply, more detached and more rational and more multi-disciplinary.

The third and final thing that I would say to kick off a productive therapy session, is that causality jurisprudence is impossible in the modern technical age. Get over it. Causality can’t be done.

Unfortunately, everything in the tort system and in the civil justice system is dependent on the old-fashioned notion of cause: this causes that, but-for cause, proximate cause, etc. “Proximate cause” is itself a political phrase, not a legal one. It is hard to understand mainly because it is a political phrase, and it reflects a general understanding that we’re going to take causality thus far and no further. We take it no further because we understand that we can get, at that point, outside the normal cognitive range of human vision. And we don’t know what the consequences are going to be if we impose fault-based financial liabilities on the basis of arguable causalities that everyday people cannot, or did not, understand when they were acting.

The result of these three things is that, as we do our pooper scooping and everybody sends us their intractable risk allocation problems, sometimes we have to say, “You know what? We can’t solve that for you or for society, because we will, in fact, make it worse. This problem is just too complicated, and requires all of society to be involved.”

I’m going to end this therapy session by telling my spouse what we might do very quickly to ease our problems, if not solve them.

I think, first of all, that we need to be nice to each other. What really concerns me is that, with all the ideologies flying around, you can get enormous meanness. And it is so destructive.

The second thing is that I think we have to keep in mind that the public is watching us. As we conduct these debates, hopefully in a civil way, we have to understand that they don’t understand what the hell we’re talking about. None of this makes any sense to the average person on the street. The result of this is that our profession, which I love and want to stay mar-
ried to, and the judiciary, which I also love, come under constant criticism. This, simply because of the fact that we’ve taken on the job of being society’s pooper scoopers, and because it has become so complicated that we can’t explain perfectly how it works to people.

I think I’ll end by saying that, for all these reasons I want to slightly alter, and re-name, the political question doctrine. This doctrine, which we heard about earlier today, is a very interesting phenomenon to me because it started out about politics and government and the judiciary and the relationship among them. I want to call it the “judicial humility doctrine” because that’s what’s going to get litigated in front of the Supreme Court this year on the global warming cases. The real question is not which branch should act so much as it is this: “What is the civil justice system institutionally qualified to do?” The political question doctrine is situated in a place in our jurisprudence from which it can easily be used to grapple with these questions of institutional competence. In the end, the courts cannot solve global warming, nor possibly allocate its financial consequences. We need to be judicially humble, and accept that this is one of the ultimate political questions. Beyond fault, still largely beyond human understanding, and certainly beyond future prediction or spreadsheet loss calculation. I can’t allocate it, and neither can the judiciary.

I want so much to close my therapy session by saying to society, “You know what? There are some things I just can’t do for you. Some things I don’t understand any better than you do.” I would say that global warming is one of them, but there are many others. And the sooner we make that into its own judicial doctrine, I think the better our relationship will be. Thank you.

**JUDGE TENNILLE:** Thank you, Bob. I’m reminded of Nassim Taleb’s quotation, “Emotions are the lubricants of reason.” They have their place. John?

**JOHN E. HEINTZ:** Let me start with a big point. And this is a big point—you’ve been hearing a lot about market economics, but we don’t allow markets in injuries. We don’t allow people to consent to batteries; generally, we don’t allow transfers of body parts. There’s a substantial number of economists who argue that we should, and that’s a different question than the one I’m addressing here, because we don’t, and we’ve created a substitute—the substitute is the civil justice system.

The civil justice system is the way that we evaluate those kinds of injuries. I think it’s useful. It can be useful to think of it in those terms. One of the things it does, is it sets property boundaries. And it does that. I want to talk specifically about a global warming case. One of the things that’s happened is, we never charged people for putting crap into the air or into the water, because we had a lot of it. Now we’re figuring out that that’s a mistake, that those indeed are finite resources.
It’s kind of a classic problem about regulating a commons. You know, and what we’re doing is taking it from what was a commons and saying, “No, we can’t let people just do anything they want there.”

John’s paper talks about the tort of public nuisance. Public nuisance is generally defined as an unreasonable interference with a right common to the public. Now you pose the question, “Is it fair to hold emitters of CO2 liable for emitting CO2 when they always did it?” Under that exact standard—that’s a common law standard—you can say, “Well, maybe, yeah,” because just because it was reasonable then, doesn’t mean it’s reasonable now. External conditions have changed. It seems to me that’s a kind of question that’s wholly within the institutional competence of the judiciary.

Let me respond to a point that Robert made about the political question doctrine. The political question doctrine is a federal doctrine. You don’t have political question doctrines in your state courts generally, at least not the way that they’re talking about it here. Indeed, we specifically did not envision the federal courts as makers of tort law, right?

The constitutional convention reacted really badly to that idea. They said, “No, no, no, no, no! We don’t want federal courts involved in mucking around with tort law.” Why did they say that? It’s not because they wanted state legislators to do it; it’s because they wanted state courts to do it. State courts have been lawmakers in our common law systems for 1,000 years. You are supposed to make law of this kind. You are supposed to look at evolving doctrines.

I would suggest one of the things that’s going on here—Fidelma Fitzpatrick has a case that’s pending in the Seventh Circuit now, that involves market share liability in Wisconsin. The defendant is a lead company—it’s a lead paint case—that acquired a company that used to make lead. When they acquired them there wasn’t market share liability, but there were a lot of extent liabilities out there, and they certainly knew lead was dangerous. Applying established Wisconsin doctrine to this, you would hold them liable under a market share theory. A federal district court judge in Milwaukee—I think in Wisconsin—held that that theory of liability violated the due process clause.

That’s essentially holding the method of the common law unconstitutional. I happen to think it’s a ridiculous ruling; these guys might not, but you can talk about that. One of the things you’re doing as market share liability evolves, is adapting the common law to new conditions that we encounter in society, which is what the common law has done—and I think has done marvelously well—for centuries. It encounters new phenomenon. Think of MacPherson-Buick. You say, “No, what’s wrong? [inaudible] is not so important in what we do anymore.” No, we aren’t going to hold the manufacturer liable when they should have known. We allocate risk in that way. We do it interstitially.

Market share liability is a way of adapting to new phenomena that we see. One of the clearest, most important new phenomena is that we now
have institutions that last longer and are solvent longer, and are more ubiquitous than they ever were before. It’s very common now to have very big, very diverse corporations that continue to exist. You didn’t encounter those as much historically because they weren’t so big, they weren’t so inaudible, and they just disappeared. But they’re there now, and the question is, “What should they be responsible for?” Interstitially, the courts are figuring that out, and they’re evolving rules.

So you have two choices. You have the system that we have that draws on experiences interstitially and pulls lessons from them and collectively evolves rules. Or you can think maybe you’ve got the ten smartest folks in the room—you can put them in a room and set them up and say, “Well, we’re the ten smartest folks in the room, and we thought about it and we decided prospectively, this is the way it should be. All right?” That’s basically the basis of the civil law system.

We don’t have a pure system either way. We have this dynamic that occurs between what happens in the courts and between what and what happens in the political branches. I would suggest to you that having both of those systems in place has served us very, very well. There’s a reason America is viewed as one of the best business environments in the world—still. Although they all complain about our legal system, they all still invest here.

A couple of points. You’re state court judges. Forty or so of you have open courts time clauses in your state constitution, which say a man has a right to sue.

Marbury v. Madison: Chief Justice Marshall says one of the first duties of the government is to provide remedies when someone is injured. We’re children of the enlightenment. We think of the Bill of Rights as restrictions on state government. We tend not to think about providing remedies of this type, providing your judicial review is one of the fundamental elements of why [inaudible].

It’s Bill Johnson’s Restaurants v. NLRB: the right of access to the courts is an aspect of the First Amendment right to petition the government for redress of grievances. The draft of the First Amendment said you had the right to petition the legislature. As it came out of committee—we don’t have any notes of the committee—it was the right to petition the government, to petition all three branches—made effective against the states by the 14th Amendment. It’s a fundamental right; it’s not only a right to speak, it’s a fundamental right.

Juries decide fact. That’s not quite true. That’s a construct that we put onto what juries do. Juries decide facts and judges decide the law. You all know your pattern jury instructions. Who decides the question of negligence in your state? Is it you or is it the jury? You submit that question to the jury, right? Is that a question of law or fact, or a mixed question of law and fact? I don’t need to categorize it, but I know that since this country was started, that’s what juries do. See, you don’t have to create the intellec-
tual construct, and then go back and try to fit what juries do into it. That’s backwards. That’s imposing your order on what exists. Those are the questions that juries decide and always have decided. That is their role.

Phil raised the notorious case in Washington—the guy who might have been a little off-base. His dry cleaners lost his pants, and he sued them, and the case dragged along forever. If there are any of you who feels that you do not have the tools to deal with—I want to say a child—who brings a $54 million suit for lost pants. Do any of you really think you have a problem taking some control of that? I mean, I want you to raise your hands if you do. I didn’t think anybody would. It’s really an anomalous thing that happens, regretfully.

JUDGE TENNILLE: All right. I wanted to give the panel a minute or two to respond to what’s been said up here, and then open it up to questions from the audience. Phil?

PHILIP K. HOWARD: Just in response to John’s points. To clarify, what I’m saying is I don’t think you have a right to take every claim to a jury. The role of the rule of law is that I can’t sue John because I don’t like his tie or because he disagrees with me. There’s not a claim for that. So the question isn’t what should be decided is a matter of law, and what should be decided by a jury in a matter of disputes. I don’t think that’s a good construct. That’s been there since Lord Cooke and before that—centuries ago.

So the question is simply not whether you close the courthouse doors, which I don’t want to do. The question is how long these claims last. So that’s what I think is an issue. Ultimately justice is supposed to serve society, so the arbiter of this question to me is not what John and I might agree or disagree on, but how the society is working. That’s the test of justice. Is it working well? Is it fair? Do people feel comfortable as they go through the day in interpersonal relations? Are people acting reasonably in running classrooms or letting kids go play? If not, why not? Are judges acting reasonably? If not, why not?

Justice is not an abstract construct. It’s something that’s a tool of a free society. So if you want to know how you’re doing, look at how the society’s working. The system of justice in commerce works extremely well because contracts are decided as a matter of law by judges. No one in this room will allow someone to bring a case that alleges that the contract was unfair because it didn’t work out. You won’t let that claim go to the jury. That’s the reason that people invest here; because courts honor the words in a contract. Reliability and consistency are essential to the rule of law. I will acknowledge what John said, which is that what I’m suggesting is certainly not the current orthodoxy.

UNKNOWN: You know, one thing that I didn’t get a chance to say, but I think is a very important thing that underpins all of the debates of all of the
panels, is that a lot of what we’re talking about is changing or challenging whether the status quo distribution of risk is appropriate. Doing nothing is a decision; it’s not simply that the problem goes away. It’s simply allowing those on whom the system outside of the civil justice system, or the legislature allows the risk to end. All of the litigation and all of the fight in the political arena is about changing who ends up with the right and who has to compensate toward interference. In that, one thing that I’m concerned about is that there is a misunderstanding about the economic consequences of these choices. Because economics [inaudible]. It only tells us that once you know who has those rights, how we reach an efficient allocation of resources.

ROBERT CUSUMANO: I think a lot of the discussion here is about what I call “new age torts” over the years. And some of those torts actually became traditional torts over those same years, and the question looking forward is “How far are we going to take it?” I know most of my comments were directed at trying to find at least some articulable, if imperfect, boundary between what the legislature and what society as a whole should do through democratic institutions, not necessarily free markets, and what is the job of the civil justice system.

I think in evaluating these new age torts, it’s entirely fair and it’s becoming more and more necessary, to understand that every right that we offer someone implies a countervailing responsibility. We have to understand what that responsibility is, and what that means for the people who live in corporations and what it means for their behaviors and what it means for the meaning of life—frankly, not to get too deep about it. I think courts are better with direct impact, tangible, direct causality cases, than they are with this more esoteric and scientific stuff. This of course is not to say that a direct impact case involving scientific evidence is not justiciable; but only to say that science moves faster than courts and juries, and that some things are not decided in science yet and should not be decided in courts.

The more complicated that causality mechanisms become, the more attenuated they become, the more we, in the civil justice system need to say, “Hey, wait a second! This is not a matter of justice and fairness anymore; this is a matter of something much more complicated, involving many more constituencies than I could ever have in my courtroom.” And at that point my so-called judicial humility doctrine might kick in.

The fundamental point for me throughout this whole conference and this panel is that too often the social justice system becomes the ultimate arbiter in our society because it offers the false appearance of being fully funded. In fact, for the most part, on day-to-day direct impact torts, we are fully funded. People do not focus on this, but on “new age” the stuff we are not fully funded.

Our society has made a conscious decision that we will not impose taxes to compensate victims of traditional direct impact torts. There you
have your risk allocated; courts need to do justice on the facts and law; and you don’t need to re-decide the basic question “who decides?” We have also made, in effect, a societal and political decision that certain injuries are not wrongs, or cannot be redressed, or should not be paid for through taxes or mandates. However, lawyers—being goodhearted people and inhabiting one of the few professions that has a mandatory pro bono aspect to what we do, and an ethical mandate of “independence”—simply cannot leave any problem unsolved until we try to tackle it. As a result, we have created an environment in which we’re only pretending to be doing risk allocation for society. It is doubtful that we were actually appointed for this job. And if we were in fact appointed, I think that appointment was unwise at best, and we should do our best to re-recruit the rest of society to help us with the assignment.

**JUDGE TENNILLE:** Do you have any questions for John?

**PHILIP K. HOWARD:** How would health courts work? So, this idea has been developed in a joint [inaudible] case [inaudible] compensation system in which you would have full time judges who just did medical malpractice cases. They would have funding for neutral experts, and there would be a trial, and you would even do a special medical appellate court with written rulings in each case and standards of care. The goal would be to minimize the cost and time of the current system, which consumes upwards of sixty cents on the dollar in legal fees and [inaudible] costs with an average of five years [inaudible].

It’s hard to imagine a worse compensation system while having all these second-level effects of defensive medicine, decline, and [inaudible]. There would be an appeal up to the regular court system, but only for issues of a constitutional nature. It’s not unlike other administrative compensation systems and justified constitutionally the same way workers’ compensation or other systems have been justified, but it’s overall better for the constituency.

We’ve done maybe a dozen public forums over the years on it, at Brookings and elsewhere. There’s a lot of material on our website, www.commongood.org, and a lot of commentary about it. Virtually everyone in healthcare is in support of it, including the large consumer groups like AARP, virtually all of the patient safety experts, and President Obama wrote a letter to the Congress in March saying he would support it. The Plaintiff’s Bar does not like it, and has opposed it successfully so far. We’re just trying to do pilot projects at the moment. It’s designed to be quicker and better for whoever’s right; but most importantly, it’s designed to be consistent, based on current medical standards of care.

**UNKNOWN:** Phil, that’s not a no-fault system, right? You still have to prove fault in the health court.
PHILIP K. HOWARD: You have to prove that it shouldn’t have happened, that’s correct.

UNKNOWN: Because on the surface it sounds like workers’ compensation, which was the great constitutional bargain of the progressive era; where it said we’re going to take away your common law right to sue, but we’re going to replace it with this reasonable quid pro quo—a system that provides you a remedy, and you don’t have to prove fault. So there’s a big difference between this and workers’ compensation. Don’t walk away thinking they’re the same.

PHILIP K. HOWARD: There is a difference, but there’s a vaccine liability system—administrative law system—that involves finding the causal relationship [inaudible] constitutional. I’m sure [inaudible]—but we’re not too insecure about that. But maybe we can meet in the courtroom on it.

UNKNOWN: I expect we will.

JUDGE TENNILLE: Any other questions? Let’s thank our panel.

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1 See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).