Losing Faith: The Supreme Court and the Abandonment of the Adjudicatory Process

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For those of us who grew up in the United States, and took junior high school civics, we learned certain constitutional axioms. We learned that any person charged with a crime will have a fair trial before an impartial jury. We learned that anybody who is injured has a right to his or her day in court. These are not incidental to our constitutional system; these are fundamental to our very notions of fairness and justice.

Over the next forty-five minutes, I would like to ask each of you—law professors, attorneys, future attorneys—to consider how true these axioms really are. To what extent are these really just myths that we keep to preserve the legitimacy of the system? My thesis tonight is that the reality is that our system does not live up to its constitutional ideals, and that, in the over thirty years since I graduated from law school, it is gotten much worse.

Now, to say that these axioms have become myths in some ways is an overstatement. Obviously, every day across the country, there are fair trials. Obviously, throughout American history, there have been those who have never had fair access equally to the courts. Through so much of American history a black man could not get a fair trial, especially in the South. Poor people have never really had access to the civil justice system. Yet I believe that increasingly the courthouse doors across the

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United States are being closed in both criminal and civil cases to litigants. As troubling as that is, I think it is even more disturbing that this may reflect an increasing loss of faith in the adjudicatory system.

We as lawyers believe in process. Maybe it is our training; maybe it is the belief in process that caused us to want to go to law school. Great constitutional scholars, like the late John Hart Ely, said that the Constitution is preeminently about process. If we are compromising process, then we are giving up something very fundamental to our constitutional birthright.

Tonight I want to paint with a broad brush because my thesis is that the whole here is worse than the sum of the parts. The whole here shows a way in which we are not a society living up to the constitutional axioms that we still teach our children in junior high school civics.

I want to divide my remarks into three Parts. First, I want to talk about the criminal justice system and what has gone on there, especially over the last few decades. Then I turn to the civil justice system. Then, finally, I consider what is going on with regard to access to the courts and fair process as part of the War on Terror.

With regard to the criminal justice system, I remember when I was in college and taking a political science course, learning that 90% of all criminal defendants in the United States plead guilty. I remember being shocked by that number because if you watched Perry Mason, which is the show that I watched as a child and probably somewhat inspired me to go to law school, no one ever pled guilty. Every week was a different trial and Perry Mason always won. I did some checking before coming here, and I learned that today, 95% of all defendants in federal court plead guilty, and it is generally the statistic for state courts across the country as well. That means that the number of jury trials has been cut in half just over the last thirty years. That is significant in itself.

It is tempting to believe that everybody who pleads guilty does so because they are really guilty. If that were true, then the statistics that I related would not be disturbing at all. But every now and then we get a glimpse that that is not the reality at all. Several years ago there was a major scandal with regard to the Los Angeles Police Department; you might remember it. It was the Rampart scandal that was exposed in the Spring of 2000. It turns out that some police officers in the Rampart Division of Los Angeles, an almost entirely Latino area, were routinely

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1. JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 75 (1980).
planting evidence to frame innocent people. It came out as a part of the investigation that a number of innocent people pled guilty.

Why would that be? Their lawyers—even highly conscientious lawyers—would see the possibility that their clients would be convicted at trial and have long prison sentences. The alternative was a deal offered by a district attorney: three to five years for a lesser crime and time served. The lawyers understandably would say to their client: “You can go to trial and face maybe fifteen, twenty years, or plead guilty and be out in a couple.” What responsible lawyer would not give that advice to a client?

Just a couple of years ago I handled a case in the Fourth Circuit, and I believed my client was innocent. He was represented by an appointed attorney in Virginia. The attorney showed up and told him, “plead guilty.” The attorney had never looked at the file. There were countless strong defenses that the attorney never raised. In fact, this lawyer was disciplined by the Virginia State Bar for his negligence in this and other cases. The lawyer’s defense in his disciplinary proceeding was that he was in the early stages of Alzheimer’s disease.

I tried to argue in the Fourth Circuit defenses that my client waived by pleading guilty. I tried, in essence, to get the Fourth Circuit to see that my client, at least likely, was innocent. I lost. As far as Fourth Circuit was concerned, my client pled guilty, and that was the end of the matter.

I think over the few decades since I graduated from law school, the changes in the criminal justice system have vastly increased the likelihood that innocent people are pleading guilty every day. I think that is the unseen cost of things like the three strikes law, mandatory minimum sentences, and the federal sentencing guidelines. They have transferred a tremendous amount of power from judges to prosecutors. The charging decision, what to charge, and whether to charge a third strike as a crime with a mandatory minimum—mean everything in determining the punishment. Think about it in terms, again, of rational criminal defense lawyers and rational defendants. A defendant can be told “plead guilty to this crime (three to five years in prison) or face being charged with a third strike, which could then mean twenty-five to life in prison.” What criminal defendant, even an innocent criminal defendant, would not plead guilty under those circumstances?

You can tell the same story about mandatory minimums, which are now so common within the federal and state levels. For the criminal defendant, the message is often the same: plead guilty to a lesser offense or face a draconian mandatory minimum.


5. Id. at 549–50, 600.
The federal sentencing guidelines have tremendously shifted power from judges to prosecutors in their charging decisions. The United States Supreme Court has contributed to this as well. Supreme Court decisions have very much given prosecutors the ability to pressure even innocent people into guilty pleas. Everyone who has studied criminal procedure is familiar with *North Carolina v. Alford*, where the Supreme Court said it is permissible for a person to plead guilty, all the while protesting his innocence, so long as there is counsel present at the hearing. There does not have to be more than a pro forma inquiry by the judge that the person is knowingly pleading guilty for the guilty plea to stand and essentially preclude all appeals. In a case called *Bordenkircher v. Hayes*, the Supreme Court specifically said it is permissible for a prosecutor to threaten prosecution under a habitual offender statute—like the three strikes law—in order to induce a guilty plea. Just a few years ago, in a case called *United States v. Ruiz*, the United States Supreme Court said that a prosecutor does not have to turn over impeachment evidence to someone who pleads guilty.

Just last year I argued a case in the Fourth Circuit involving a man who was convicted of murder and sentenced to death. He plead guilty to the crime. He left it all in the hands of the jury in the penalty phase and they sentenced him to death. There is no doubt whatsoever that the prosecutors in this case failed to turn over key exculpatory evidence that was requested until two days after he pled guilty. My argument, of course, was that this should undo the guilty plea. This was not merely impeachment evidence; this was evidence that could be used to exculpate him with regard to key elements of the charges against him. I lost in the Fourth Circuit. The Fourth Circuit said it could not be shown that the jury would not have sentenced him to death anyway. The Supreme Court denied review. He now faces execution.

We can talk about the myth that anyone charged with a crime will get a fair trial before an impartial jury, but I do not think we can square it with this reality. We can say "there is a safeguard that is there. Those who are convicted will at least have access to federal court via a writ of habeas corpus to give them protection." But if we want to talk about how

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7. Id.
10. Wilkinson v. Polk, 227 F. App'x 210, 211 (4th Cir. 2007).
11. Id. at 213.
12. Id.
13. Id.
14. Id.
15. Id. at 218-19.
LOSING FAITH

An article was recently written by Professor John Blume of Cornell University where he studied some federal districts, and he found in those districts that only 2.5% of habeas petitions were granted, or to put it another way, 97.5% were denied.\(^\text{17}\)

By itself, this statistic does not tell us anything. Maybe only 2.5% are meritorious. And yet, if you look at what the Supreme Court and especially Congress has done to habeas corpus, it becomes clear that likely countless meritorious habeas corpus petitions are being thrown out on procedures. For example, the 1996 Antiterrorism and Effective Death Penalty Act says that there is a one-year statute of limitations for bringing a habeas petition from the end of state court proceedings.\(^\text{18}\)

By itself, that sounds pretty innocuous. And then you realize that the time the habeas petition is pending in federal court counts against that statute of limitations.\(^\text{19}\) So let me tell you about something that happens all the time; it has happened in my cases. Imagine you have a very conscientious state prisoner who files a habeas petition almost immediately at the end of state proceedings. And the federal judge sits on the habeas petition; fourteen months, sixteen months, eighteen months or longer; that goes on all the time. Then imagine that that judge dismisses the habeas petition because there was not complete exhaustion of state remedies as required. This happens all the time, too. Forty percent of all habeas petitions are dismissed for lack of complete exhaustion. That person is barred from ever again filing a habeas petition. Now, maybe there will be some doctrine of equitable estoppel; the circuits are split on it.\(^\text{20}\) But that is the consequence of the Antiterrorism and Effective Death Penalty Act.

The Antiterrorism and Effective Death Penalty Act says, also, that a prisoner can bring only one habeas petition unless there are extraordinary circumstances and prior approval by a federal court of

\(^{20}\) Compare Zarvela v. Artuz, 254 F.3d 374, 381–83 (2d Cir. 2001) (equitable tolling of the AEDPA’s one-year limitation period was warranted where district court dismissed petitioner’s prior habeas petition on exhaustion grounds without staying the exhausted claims or advising him of his right to delete the unexhausted claims), and Fahy v. Horn, 240 F.3d 239, 244–45 (3d Cir. 2001) (equitable tolling warranted where petitioner made a reasonable, although ultimately mistaken, judgment as to whether exhaustion in state court would be appropriate), with Larry v. Dretke, 361 F.3d 890, 896–98 (5th Cir. 2004) (equitable tolling not warranted as a result of problems arising from the exhaustion requirement).
appeals. This too, by itself, sounds innocuous until you realize that virtually all habeas petitions are brought pro se by prisoners. They often do not know what claims are available to them. They might file a habeas petition and only later learn of a much stronger claim but almost surely they are out of luck. There are so many procedural barriers that have been built into the law of habeas corpus—including that even the prisoner who can get past all the obstacles still faces a very high burden in the terms of getting relief.

The law, in 28 U.S.C. § 2254(d), says that a federal court can grant habeas relief only if the state court decision is "contrary to," or "an unreasonable application of," clearly stated law by the Supreme Court. Once more, this may seem innocuous until you see how it is applied.

I argued a case in the United States Supreme Court about five years ago, a case called Lockyer v. Andrade. My client, Leandro Andrade, was sentenced to life in prison with no possibility of parole for fifty years for stealing $150 worth of video tapes from Kmart stores in San Bernardino, California. He received this sentence, even though he had never committed a violent crime, under California's three strikes law. California is the only state in the country where the third strike does not have to be a serious or violent felony. Any felony is sufficient.

One of the many ironies, cruel ironies of this case, is that if his prior crimes had been rape and murder, he could have been charged only with two counts of petty theft. But because his prior crimes were burglary of unoccupied homes (property crimes), he could be charged with two counts of what is called petty theft with a prior property crime. That then could be two felony convictions.

The prosecutor could have him charged with two counts of petty theft; maximum of a year in jail. He could have charged him with two counts of petty theft with a prior and not charged him under three strikes. But the prosecutor charged him with two counts of petty theft with a prior as felonies, both as third strikes, and he was given life in prison with no possibility of parole for fifty years.

The California Court of Appeal affirmed his conviction and sentence. The California Supreme Court denied review, as it has done

22. Id. § 2254(d).
24. Id. at 66–68.
25. Id. at 78 (Souter, J., dissenting).
26. Id. at 67 (majority opinion).
27. Id.
28. Id.
29. Id. at 68.
30. Id. at 69.
in every case under the three strikes law challenging sentences as cruel and unusual punishment. He filed a pro se habeas petition, which was denied. I was appointed to represent him in the Ninth Circuit, and the Ninth Circuit ruled in his favor two to one. The State of California sought certiorari and the United States Supreme Court, five to four, reversed the Ninth Circuit and ruled against Andrade.

Justice O'Connor wrote the opinion for the Court, joined by Chief Justice Rehnquist, Justice Scalia, Justice Kennedy, and Justice Thomas. Justice O'Connor's opinion focused on that language from § 2254(d) that I quoted. She said in order to be contrary to a Supreme Court precedent, in order to be contrary to a clearly established law, it has to be contrary to a Supreme Court precedent that is on point. I thought I was in great shape here. There was a Supreme Court decision called Solem v. Helm. It involved a man in South Dakota who was sentenced to life in prison with no possibility of parole for passing a bad check, worth $100. The Supreme Court had declared his sentence to be cruel and unusual punishment. That seems to show that the California decision upholding Andrade's sentence was contrary to clearly established law by the Supreme Court.

Justice O'Connor rejected that argument. She said in Solem v. Helm, the defendant was sentenced to life in prison with no possibility of parole. Leandro Andrade is eligible for parole, after fifty years, in the year 2046, when he is eighty-seven years old. In theory, there is a distinction there; but everything we know about the life expectancy of prisoners is that Leandro Andrade is going to die in prison. If there is ever a distinction without a difference, this is it. But that is what the Supreme Court says "contrary to, or an unreasonable application of federal law means."

Some of you in this room are probably civil litigators or transactional lawyers, and you say, "well that is the criminal justice system." Now let us talk about the civil justice system. Not long ago I went to see a doctor for the first time and the receptionist gave me a whole stack of papers that I had to fill out before the physician would see me. I usually do not
pay much attention to what I sign; I am not a good lawyer in that way, but I noticed that one of the forms said that if I had any dispute with the doctor, it would go to arbitration, and I was waiving my ability to go to court. I went to the receptionist and I said, "I don't want to sign this form. Will the doctor still see me?" She said, "I don't know; nobody has ever refused to sign it before." She said, "I have to check with the doctor." She came back and thankfully said, "Yes, the doctor will see you." I imagine this is a doctor who sees a large number of patients every day, and I am the first one to say I would not sign the form. This happened to be one physician in Los Angeles, California. How many others across country routinely ask that people, if they are injured, give up ability to go to court?

Around the same time, I bought a new computer; it was from Dell. Being interested in this, I happened to read the fine print that came with it (and I, again, never do that). Sure enough, there was a clause that said by buying the computer and by turning it on, I was agreeing that any dispute that I would have with Dell would then go to arbitration.

I sent a letter back to Dell saying "I do not consent to this and by opening my letter you hereby consent that I can take you to court." True story. I am pleased to report the computer has worked fine; I have had no occasion for suing Dell.

I looked, in researching for this Speech, to try to find out what percentage of civil disputes now go to arbitration rather than to the adjudicatory process in court. I could not find those statistics. Maybe they exist. My sense is that there has been a dramatic increase in the number of cases that go to arbitration, but it is hard to know what has been the shift from the adjudicatory process to the arbitration process in part, of course, because arbitrations are not reported.

Here too, the Supreme Court, especially in recent years, has tremendously fueled the shift from court adjudication to arbitration. A key Supreme Court decision earlier this decade was Circuit City Stores, Inc. v. Adams. It involved an employee of Circuit City here in California. He believed that he was the victim of discrimination. His lawyer—a very astute lawyer who paid careful attention in law school—decided he was much better off filing solely under California antidiscrimination law in a California court. The lawyer clearly did not want the case, probably for a variety of reasons, to go to federal court. Since he was suing just under California law, in California court, it could not be removed.

42. Id. at 109–10.
43. Id. at 110.
44. See id.
Circuit City filed a separate action in federal district court to compel arbitration under the Federal Arbitration Act.\textsuperscript{45} There is an exception to the Federal Arbitration Act, a law passed in 1925, that says that arbitration is not required for claims by, and I am now quoting you the exact language, "seamen, railroad workers and other employees in foreign or interstate commerce."\textsuperscript{46} The Ninth Circuit said that the Federal Arbitration Act does not apply here.\textsuperscript{47} By definition, Adams is an employee in interstate commerce. The Federal Arbitration Act says that arbitration is not required if it is an employment dispute for somebody who is in interstate commerce.\textsuperscript{48}

The Supreme Court, five to four, reversed.\textsuperscript{49} It is interesting, the majority was comprised of the same five Justices who were in the majority in \textit{Lockyer v. Andrade}.\textsuperscript{50} They interpreted the statute to say that "employees in interstate commerce" only refers to transportation workers;\textsuperscript{51} that if it is a transportation worker, then there cannot be mandatory arbitration, but for any other employees, then the Act applies.\textsuperscript{52} And this applies not just in Adams' case, but in countless other cases of employees with discrimination and other claims who must go to court rather than arbitration.

There was a Supreme Court decision two years ago about arbitration. My guess is that if I ask for a show of hands almost no one in this room would have heard of it unless you specialize in alternative dispute resolution. It is a case called \textit{Buckeye Check Cashing, Inc. v. Cardegna}.\textsuperscript{53} The case involves a business in the State of Florida that cashes checks, especially for day laborers and others who get paychecks on a weekly basis.\textsuperscript{54} The business charges an exorbitant rate for cashing these checks.\textsuperscript{55} In order for an individual to get to use this check cashing service, he or she has to sign an agreement that any dispute will go to arbitration.\textsuperscript{56}

A challenge was brought as to whether the interest, the amount of money that is charged, in order to cash the check, violates Florida law.\textsuperscript{57} The question that was raised for the Florida courts was whether they

\textsuperscript{45} Id.


\textsuperscript{48} See 9 U.S.C. § 1.

\textsuperscript{49} \textit{Circuit City}, 532 U.S. at 107, 124.

\textsuperscript{50} Id. at 107; see \textit{Lockyer v. Andrade}, 538 U.S. 63, 65 (2003).

\textsuperscript{51} \textit{Circuit City}, 532 U.S. at 119.

\textsuperscript{52} Id.


\textsuperscript{54} Id. at 442–43.

\textsuperscript{55} Id. at 443.

\textsuperscript{56} Id. at 442–43.

\textsuperscript{57} Id. at 443.
could hold the arbitration clause invalid on unconscionability grounds? I am not a contracts law expert. I do not remember all that much from first year contracts. I know it is hard to challenge contracts as being unconscionable. But I would also think, if any contract rises to the level of unconscionability, this is it. In order to cash your check, you sign an agreement and one part of the fine print says if you have a dispute over it, you can go to arbitration, not to court. There is no bargained-for exchange. If ever there is a contract of adhesion, this is it.

The Florida Supreme Court ruled that a court could declare this contract, this specific term, invalid under unconscionability grounds and then the matter would not have to go to arbitration. The United States Supreme Court reversed. The Supreme Court said that the question of whether or not the arbitration clause is unconscionable has to be resolved in arbitration. That is a tremendous favoring of arbitration over the civil adjudicatory process.

When I talk about closing the courthouse door, the place where it has been most so is with regard to civil rights litigants. It is very difficult now for some kinds of civil rights plaintiffs to get to court at all. Over the last decade, the Supreme Court has made it impossible for individuals to be able to bring causes of action under federal civil rights statutes that do not expressly contain them.

I know this sounds abstract, so let me give you a specific example. Some of the most important tools in civil rights litigation for the last couple of decades have been regulations adopted under Title VI of the 1964 Civil Rights Act. The 1964 Civil Rights Act, in Title VI, says recipients of federal funds cannot discriminate based on race. Regulations that were adopted by the then Department of Health, Education and Welfare said that recipients of federal funds cannot engage in practices that have a racially discriminatory impact.

I am sure you have all heard about the environmental justice litigation that is gone on around the country, challenging the fact that power plants, or toxic waste dumps, or garbage sites are much more likely to be located in poor minority communities than in more affluent

59. Id. at 228.
61. Buckeye, 546 U.S. at 449.
62. Id. at 445–46, 449.
64. 45 C.F.R. § 80.3(b)(2) (2007) (forbidding recipients of federal funds from “utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin” (emphasis added)).
areas. All of that litigation occurred under the Title VI regulations that I have just described.  

In Los Angeles, there was a major lawsuit brought challenging how the bus lines were drawn.  It turns out that the bus lines were drawn very much to favor the affluent white communities at the disadvantage of the poor minority communities. If you are in a white community, it is much more likely in Los Angeles that you will get a direct bus route. If you are in a poor minority community, it is much more likely you are going to have to take three or four buses to get where you want. A challenge was brought under those Title VI regulations.

Just a few years ago, in a case called Alexander v. Sandoval, the Supreme Court, five to four, with the same five Justices in the majorities in the other cases I mentioned, ruled that there can be no lawsuit to enforce the Title VI regulations.

The Supreme Court has tremendously decreased the ability of civil rights plaintiffs, if they succeed, to get attorneys' fees. Again, these are not the cases that make headlines, and if you do not do civil rights litigation, there is not much reason you would know about them. But several years ago, in a case called Buckhannon v. West Virginia Department of Health & Human Resources, the Supreme Court said if the government voluntarily changes its practices, or if a private defendant voluntarily changes its practices, it is not liable for attorneys' fees, even if the lawsuit against it was the catalyst for reform.

What that particular case involved was a lawsuit against the state of West Virginia and its agency for discriminating against patients with disabilities and elderly patients. The litigation went on for almost two
years. Right before the judge was going to clearly rule against the defendant, the state simply changed its policy voluntarily and did everything that the plaintiffs had been asking for. The plaintiffs came forward and said, “We’re the catalyst for this change. We should get attorneys’ fees.”

Every circuit but one, the United States Court of Appeals for the Fourth Circuit, had accepted the catalyst theory. Unfortunately, West Virginia is in the Fourth Circuit, so the plaintiffs lost, and they went to the Supreme Court.

The Supreme Court, five to four, with the same five Justices in the majorities as each of other cases that I have talked about, said that plaintiffs are not entitled to attorneys’ fees unless the reform comes directly from a court action—either a judgment or a court approved settlement. A voluntary change in policy cannot be the basis for attorneys’ fees, even if the plaintiffs’ suit is the catalyst for it. If you represent defendants, and there is a suit where your client might be liable for attorneys’ fees, there is a lesson here: just change your policy the day before the court order, and you protect your client from attorneys’ fees. But if you are a lawyer whose organization or practice depends on attorneys’ fees, the ability to get them has been tremendously limited.

Just last year, the Supreme Court, in another case, said if a plaintiff succeeds in getting a preliminary injunction, the plaintiff is not entitled to attorneys’ fees unless there is then a permanent injunction issued. Imagine that a plaintiff sues to get a preliminary injunction, against any unconstitutional, illegal practice. Imagine the preliminary injunction is in place for ten years. The plaintiff has surely substantially prevailed. But then imagine that plaintiff does not get the permanent injunction. According to the Supreme Court last year, there can be no attorneys’ fees.

Let me give one more example from the civil justice system that, to me, is all about a Supreme Court that has lost faith in part of the system: that is the Supreme Court decisions from the last decade that limit the ability of juries to award punitive damages and empower courts to overturn punitive damage awards. Substantial limits have been imposed in this regard. The Supreme Court has said, for example, that generally punitive damages have to be in a single digit ratio to compensatory

71. Id.
72. Id.
73. Id. at 601.
74. Id. at 602 n.3.
75. Id. at 601-02.
76. Id. at 604-05.
77. Id. at 605.
79. Id.
damages—that generally they cannot be more than nine to one. I wonder where a majority that believes in strict construction of the Constitution comes up with this rule.

Or, another example is from last year, in 2007, Philip Morris USA v. Williams. The Supreme Court said punitive damages have to punish a defendant just for harm suffered by that plaintiff; they cannot be to punish a defendant for harm suffered by third parties. This is a dramatic change in the law of punitive damages. Always punitive damages were to punish, to deter. Again, where does this come from?

The same year that I argued and lost Lockyer v. Andrade in the Supreme Court, I argued and lost a case in the California Court of Appeal called Romo v. Ford Motor Co. The Romo family had bought a 1978 Ford Bronco, and Ford knew when it made this particular vehicle that it was terribly dangerous. It had a propensity to roll over, and Ford did not include a rollover bar. At the trial, lawyers put before the jury documentation that Ford knew about this, but it wanted to rush the vehicle to market to be able to challenge the Chevy Blazer, and it felt that it could just absorb the damages.

The Romo family was driving, they had a rollover accident, three members of family died, and three were seriously injured. A jury, here in California, awarded them $6 million in compensatory damages, and $285 million in punitive damages. The California Court of Appeal approved the punitive damage award. In a published opinion, the California Court of Appeal said, based on the evidence before the jury, what Ford did here was tantamount to manslaughter.

The Supreme Court then decided State Farm Mutual Auto Insurance Co. v. Campbell, in 2003. That was the case that said punitive damages should generally be in a single digit ratio to compensatory damages. The Supreme Court sent Romo v. Ford back to the California Court of Appeal and the California Court of Appeal reduced the $285 million punitive damage award to $23 million in punitive damages. It is still a

82. Id. at 353.
83. Id. at 353.
84. Id. at 797–98, 806.
85. Id. at 806.
86. Id. at 797–98.
88. Id. at 145.
89. Id.
90. 538 U.S. 408 (2003).
91. Id. at 425.
substantial amount, but it was a horrible feeling to have to call and tell my client that I lost them about $260 million.

All I could think that day, and I know it sounds terribly cynical, was to compare *Lockyer v. Andrade* and *Romo v. Ford*. I said that I guess the principle of my legal practice for this year is: too many years in prison for shoplifting does not bother the court, but too much money from a corporation in punitive damages is unacceptable.

Let me talk about a third and final area with regard to access to the courts and faith in the adjudicatory process: civil liberties in the War on Terror. I believe that the most important legal issues for this decade, maybe for our generation, concern civil liberties in the War on Terror. I think there is no place where we more see a loss of faith in the adjudicatory process, at least by the executive branch, than here. Think about some of the things that have gone on since September 11th. One thing we know is the claim of authority to detain people without providing due process or judicial review. I would ask you to each ask yourself a simple question: how many people is the United States government now detaining, or has it detained as part of the War on Terror since September 11, 2001?

I am confident that no one in this room knows the answer to that question, because the government will not tell us. Until December 31st of 2001, the government announced the number of noncitizens it was holding as part of the War on Terror for immigration violations. They then said that they would not tell that number anymore. They have never disclosed the number of individuals being held on material witness warrants. They have never told the number who are being held in CIA rendition camps across the world.

Several years ago, I debated Michael Chertoff, the head of the Department of Homeland Security, at a judicial conference. I asked this question: “How many people is the government detaining or has it detained as part of the War on Terror?” He said, “I can’t tell you. That’s classified information.” I said, “I’m a simple law professor, but I don’t understand how it would hurt national security if you tell us it’s five hundred, five thousand, or fifteen thousand.” He refused to answer.

We know of examples. We know that Jose Padilla was apprehended at the Chicago airport in May of 2002 and held without any form of hearing, due process, or judicial review until late December of 2005, when he was criminally charged.93

We know that Ali al-Marri is an individual who is a student at Bradley University in Peoria, Illinois; a noncitizen, though a lawful, long

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term resident alien.⁹⁴ We know, with regard to him, that he was apprehended in 2002, we are now in April of 2008, and he has never had any form of hearing, administrative or judicial.⁹⁵ We know that there have been as many as 700 people in Guantánamo Bay, Cuba.⁹⁶ There have been the Combatant Status Review Tribunals, but even the man who was the liaison between the CIA and the Justice Department said that they were a sham.⁹⁷

I have been representing a Guantánamo detainee since the summer of 2002; Saleem Gborchi. I do not know why he is being held. He claims he does not know. The Bush administration has consistently taken the position that there should be no judicial review, in fact, no access to the federal courts, for those who are held as Guantánamo detainees.⁹⁸

The Supreme Court, in Rasul v. Bush, in 2004, said that Guantánamo detainees have access to federal courts via a writ of habeas corpus.⁹⁹ But Congress then passed the Detainee Treatment Act¹⁰⁰ and, more recently, the Military Commissions Act of 2006, that says that noncitizens held as enemy combatants shall not have access to any federal court via writ of habeas corpus.¹⁰¹ If there is a military proceeding against them, and I emphasize the "if" because there is nothing in the law that requires it, they then can get review in the D.C. Circuit, but only for claims under the Constitution and federal statutes; no court can ever review claims under treaties, like the Geneva Accords.¹⁰²

Where the government has provided procedures, they do not meet the most minimal nature of due process or international accords with regard to human rights. I already spoke of the Combatant Status Review Tribunals. If you are familiar with them you know, they are entirely ex parte. The Guantánamo detainee is not entitled to have an attorney or any representative. There is no standard of proof really on the government; it is just a question of do they believe there is enough to detain somebody. The Combatant Status Review Tribunal has no

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⁹⁵. Id.
meaningful rules of evidence, nothing that we would associate with the rudiments of due process.

The Bush administration promulgated rules for military tribunals. Those rules would allow those being prosecuted, including facing potential death sentences, to be completely excluded from the proceedings against them and even their lawyers to be excluded against them. It would allow evidence gained by torture to be used against them. The Supreme Court found these procedures to be inconsistent with the Geneva Accords and also the Uniform Code of Military Justice.103

Congress then passed the Military Commissions Act. In some ways, the procedures under that act are better than the under the Bush executive order, but they still do not meet international law. Still there is more ability to exclude a defendant than international law would allow. Even more troubling, still there is the ability to use evidence against somebody, gained by torture, so long as the trier of fact finds it to be reliable.104 I do not know how evidence gained by torture could ever be reliable.

So far, the Supreme Court has had a mixed record with regard to its faith in process when it comes to civil liberties in the War on Terror. In Hamdi v. Rumsfeld, in 2004, the Supreme Court held, five to four, that the United States government may detain United States citizens, apprehended in a foreign country, held in the United States, as enemy combatants.105 The Supreme Court did say that these individuals have to be given due process, but Justice O'Connor, writing for the Court, outlined what due process required. It is very troubling. One thing she said is the government could put the burden of proof on the individual to show that he or she is not an enemy combatant.106 Proving a negative is always incredibly difficult. I am not sure how I can prove to you that I am not an enemy combatant, let alone how Yasser Hamdi could prove that. This seems inconsistent, again, with our basic constitutional norms, to say nothing of international human rights.

In Hamdan v. Rumsfeld, in 2006, the Supreme Court, five to three, ruled that the procedures for military commissions did not meet the requirements of the Geneva Accords and the Uniform Code of Military Justice.107 But it was five to three. John Roberts recused himself because he had been part of the D.C. Circuit panel that ruled against Hamdan; so there is reason to believe that it would have been five to four had Roberts participated. Most recently, in June 2008, in Boumediene v.

104. Boumediene, 128 S. Ct. at 2260.
106. Id. at 533–34.
107. 548 U.S. at 625.
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Bush, the Supreme Court held that the Military Commissions Act of 2006 is an unconstitutional suspension of the writ of habeas corpus in denying enemy combatants access to federal court via habeas corpus.108

I said at the outset I was going to paint with a broad brush, because I do believe that the whole needs to be focused on. Now, I can go back through each of the areas that I talked about and suggest for you particular reforms to change it. I would change the guilty plea process to require that there be a meaningful hearing where a judge determines that there is a basis for believing that the defendant is guilty before a guilty plea is accepted. It would be inefficient, but it would lessen the likelihood that innocent people would be imprisoned as a result of the pressures that lead to guilty pleas.

I would hope that the new President and the new Congress would reconsider some of the draconian provisions of the Antiterrorism and Effective Death Penalty Act. I am not optimistic about it. When is the last time that Congress or a state legislature passed a law that expanded the rights of criminal defendants or prisoners?

I think the Federal Arbitration Act can be revised to preserve the ability for adjudication in a wide range of cases. I think there can be an omnibus civil rights act that better protects the ability of civil rights and civil liberties litigants to have access to the courts and get attorneys’ fees. I am hopeful that a different administration will more respect the need for adjudication and fair process with regard to the War on Terror.

But I worry that to just focus on each of these examples is again to lose sight of the overall picture. I worry that all of this, as I said in my introduction is about a Court, an administration, maybe a society that is losing faith in our adjudicatory process. So I conclude by asking you the question that I started with. Over the time that you have been attorneys or law professors or, for that matter, law students, have the processes of criminal and civil adjudication become better? Are we doing a better job now than when you began law school of living up to the constitutional axioms that we all learned in junior high school?

The late Justice William Douglas said we will not lose our freedoms all at once. He says it is the nature of erosion of liberty that it will happen incrementally, a little bit at a time,109 and I worry that is what is happening with regard to the most basic notions of fairness and due process.

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108. 128 S. Ct. at 2229.

109. The Douglas Letters: Selections from the Private Papers of Justice William O. Douglas 162 (Melvin I. Urofsky & Philip E. Urofsky eds., 1987) ("As nightfall does not come all at once, neither does oppression. In both instances, there is a twilight when everything remains seemingly unchanged. And it is in such twilight that we all must be most aware of change in the air—however slight—lest we become unwitting victims of the darkness.").
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