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## LEGAL MATTERS

### THE IMPORTANCE OF BEING IRREVERENT:

A conversation with Dahlia Lithwick on covering the Supreme Court

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*“Joseph Margulies represents Munaf/Morgan and Omar/O’Hara. His first few minutes of argument are impressive. He’s in the middle of distinguishing Hirota from his clients’ case when suddenly Justice Stevens kind of hurls himself at his head like an enraged bobcat in a bow tie. ‘Does your case depend entirely on the fact that these are American citizens?’ Margulies tries to reply, but Stevens cuts him off again and then again. And yet again. Stevens beats on him like a*

*drum about whether or not the detainee’s citizenship matters and then about whether or not the place of detention matters, and by the time Kennedy gets his mitts on Margulies, it’s no longer clear what matters at all. Justice Ginsburg kneecaps him with yet another hypothetical, and Justice Alito starts up again with the citizenship.”*

From Slate’s Supreme Court dispatches: “Oral Argument From the Court. Jail of Two Cities: The Supreme Court Gives the Right to Habeas Corpus a Swirly.” By Dahlia Lithwick, March 25, 2008



**Dahlia Lithwick '96** has emerged over the last few years as the cool face of the law—an answer to bad lawyer jokes everywhere. A Stanford JD and former Yale debater, she's an accidental journalist who, after a brief stint as a law clerk, lucked into a reporting job at the online magazine *Slate*. A decade later, her columns, now also in *Newsweek*, reach millions of readers and are helping to shape the debate on a range of issues from Guantanamo to fair wages for women.

Lithwick wields her pen like someone on a mission, throwing open the curtains of the closed world of the U.S. Supreme Court and shedding light onto sometimes obtuse legal questions. This is important stuff, and her dispatches relay the weight of the matters with snappy commentary—the sort of writing that you want to read out loud over the breakfast table. And that is what Lithwick is doing—bringing previously lofty legal issues into the average American's home, her humor drawing in lawyers and lay people alike. And the law has never been so interesting to follow.

*“Professor Jeffrey Fisher of Stanford University represents the class of plaintiffs in this case, and in addition to having the best hair of the Supreme Court appellate bar, he is also one of its coolest new additions.”* From *Slate's* Supreme Court dispatches: “Oral Argument From the Court. Oil and Water: The *Exxon Valdez* Case Runs Aground at the Supreme Court.” By Dahlia Lithwick, February 27, 2008

It's easy to fall into the superlatives trap when describing Professor **Jeffrey L. Fisher**. He has made it onto many of the “top” lists lately: *The Daily Journal's* “20 under 40” of the most influential young lawyers, the *National Law Journal's* “40 under 40” top ten, *The American Lawyer's* “Fab Fifty” list of up-and-coming litigators under 45. Though still in his mid-30s, it's clear that Fisher is no longer just up-and-coming.

When Fisher joined the law school faculty in 2006 to co-direct the Supreme Court Litigation Clinic, he was already a leading Supreme Court litigator and nationally recognized expert on criminal procedure with roughly two dozen cases and four oral arguments before the Court under his belt, including wins in the landmark right-to-jury-trial case of *Blakely v. Washington* and Confrontation Clause case of *Crawford v. Washington*. Since then he has reveled in his role as clinic teacher, immersing himself—and his students—in Supreme Court work, including arguing an additional five cases before the Court, the most recent being *Kennedy v. Louisiana*, in which he persuaded the Court that the Eighth Amendment forbids imposing the death penalty for crimes against individuals in which the victim does not die. It's safe to say that Fisher has not only arrived, but is at the top of his game. -SHARON DRISCOLL

**Fisher:** LET ME START WITH THE MOST OBVIOUS QUESTION OF ALL, WHY DID YOU GO TO LAW SCHOOL?

**Lithwick:** That's actually a good question. First, I was a Yale debater and literally every one of us went to law school. I knew I was pretty good at talking on my feet so cab driving was out.

Also, between college and law school I wrote a book about Paul Newman's camp for terminally ill kids. I had worked at the camp while I was in college and had gotten very, very involved in the lives of some of these kids and their health insurance woes and their inability to get specialized education. There were a hundred million ways in which the law was failing them.

And third there was Marian Wright Edelman: commencement speaker to a whole generation of women.



**I GRADUATED FROM DUKE IN '92 AND THERE SHE WAS.**

So then you know. And didn't all these women who planned to be actresses and orthodontists and chicken pluckers hire themselves off to law school instead? She really did have that kind of influence. The idea of being a children's advocate had never

crossed anyone's radar until she gave that spate of commencement speeches. I was one of those women.

**APPLICANTS FOR THE CLINIC SEEM TO ALL SAY "I'M A REAL SUPREME COURT JUNKIE." WERE YOU ONE TOO AT SLS?**

Not one bit. Were you?

**NOT SO MUCH, BUT IT SEEMS THERE HAS BEEN A SHIFT SINCE WE GRADUATED FROM LAW SCHOOL. NOW THERE'S A CONTINGENT OF LAW STUDENTS CLOSELY FOLLOWING THE COURT.**

I think that's right. It's embarrassing to admit—but when I set foot in the Supreme Court on my first day covering it, I'm not sure I could have named all nine justices. There wasn't the calcified Supreme Court that we had at least until two years ago, which—like the cast of *Seinfeld*—didn't change year after year.

**DO YOU THINK THAT YOUR WORK FOR SLATE, AND THAT OF OTHERS ONLINE, HAS HELPED TO BRING THE COURT MORE INTO THE FORE OF LAW STUDENTS' CONSCIOUSNESS AND INTO AMERICAN PUBLIC DISCOURSE MORE GENERALLY?**

I've heard that from other reporters on the Court—that one of the things *Slate* did when it started covering the Court was to cover it in a really accessible way—and so broaden the audience of interested people. And then, certainly the Internet and particularly these amazing professor blogs have done a lot to introduce new audiences to the Court—including those who perhaps perceived it as too inaccessible and mystifying. In my case, humor probably helped that effort a lot.

**I'VE HEARD THAT YOU WISH YOU HAD ENJOYED SLS MORE.**

Well, don't we all? There were months when I felt like I was going through law school on my knees. I was a duck out of water the whole time. I also had very thin skin.

**WITH RESPECT TO THE OTHER STUDENTS? OR WAS IT THE MATERIAL?**

It was partly the other students, partly the big-firm sensibility, that feeling that every choice you made was hedged against certain outcomes. I found it very narrowing. I went through in this deranged panic—worried that maybe taking a misstep would mean having to work at Starbucks for the rest of my life.

**I TELL STUDENTS, "YOU CAN GO TO SEATTLE; IT'S OKAY."**

Every student needs to hear that. Barbara Babcock happened to be that voice for me, the person who said you don't have to do what everyone else is doing.

**IT'S HARD FOR STUDENTS TO SEE THIS WHEN THEY'RE IN THE MIDST OF LAW SCHOOL, BUT IT'S OFTEN THE WACKIEST CHOICE OF ALL THAT OPENS UP NEW OPTIONS YOU NEVER KNEW YOU HAD. AND I WONDER IF YOU WANT TO TALK ABOUT THAT, BOTH IN TERMS OF GOING TO RENO AS YOU DID AND HOW YOU GOT ON WITH SLATE TO BEGIN WITH.**

It flows into what I was saying before about being so afraid of missteps. Missteps are always the smartest thing you ever do. I got a clerkship in Reno and so off I went.

**YOU CLERKED FOR CHIEF JUDGE PROCTER HUG JR. '58?**

Yes. He was made the chief of the Ninth Circuit at the exact time that I was graduating, which was in January because I had dropped out for a little while—see above insanity and despair. So he was suddenly allocated space for a fourth clerk and I happened to be one of a handful of people just graduating. I clerked for him and that was amazing, because he was amazing and because I developed a slight gambling addiction. He also let me do some of his speechwriting and writing for lay readers and this was when I thought, "Oh, I almost prefer to write about the law from the outside."

**SO, THE LIGHT BULB WENT ON.**

That's right. I stuck around Reno for a couple of years working in a divorce firm, which was not my thing. So I quit. I quit to just write. I had socked away \$10,000, enough to pay rent and write, and that was what I did for a couple of months. Then I was in Washington visiting a friend, and *Slate* was maybe a year old at the time. I just happened to be sleeping on this friend's couch when in the middle of the Microsoft trial *Slate's* reporter left. So *Slate* was looking for someone to fill in, just anybody with a pulse to cover the trial, while looking for a "real writer" to do it. The people at *Slate* called my friend, who couldn't take the job—and she handed me the phone.

**THE BET PAID OFF.**

Yes. I literally was sleeping on the right couch in the right apartment at the right time. I had never really done any journalism and I didn't understand antitrust at all. I didn't know what I was doing, but I just went in and told jokes. I'd file stories all week long and every Friday I'd say, "Could I maybe have this as a permanent gig until the end of the trial?" And they'd say, "No, we're still looking for a real writer." So it was an exercise in taking a flyer. But I was lucky, because for me it was the perfect forum in which to write—this instant, slightly quirky humor, kind of "law as theater." It was absolutely the luckiest kind of confluence: *Slate* and Microsoft and the law and me, all being in the right place.

**SO WHEN SLATE HIRED YOU, DID YOU HAVE ANY CONSCIOUS GOALS ABOUT WHAT YOU'D BRING TO YOUR COVERAGE?**

If I had known how strict and almost monolithic the conventions in Court coverage were, I might not have been quite as brave as I was. I don't know why I just took it for granted that the bandwidth of Court coverage was as broad as the bandwidth of political coverage in the U.S. I just assumed it.

It took me about six months to realize I was out of my frickin' mind, that what I was doing was not even close to what other people were doing. If I had known how irreverent I was being with respect to how other people talked about the Court, I'm not sure I could have done it. Of course I wanted to be funny and irreverent, but going back to that first question—because I wasn't a Court junkie. . . .

**YOU DIDN'T HAVE THE REVERENCE.**

Right, I just didn't know.

“I’m trying to grow a stiff enough spine to write the piece about this. I think one justice in particular has crossed over the line into advocacy and it’s unbearable—or very hard to watch. But nobody calls him out.” DAHLIA LITHWICK ’96

DO YOU SEE IT AS A PROBLEM THAT THE COURT IS STILL OFTEN COVERED IN THE MAINSTREAM MEDIA WITH SUCH KID GLOVES?

Yes. And what I do has gone from being sort of a happy accident to almost a mission. Certainly one of my objectives has been to distance myself from the older convention of Supreme Court reporter as acolyte. That’s not to condemn my colleagues though. However, I find it particularly dangerous in such a closed-off Court. It’s actually antidemocratic to cover the Court as though it’s a mystical, marble temple and God’s work comes out of it.

GOING BACK TO THE REVERENCE ASPECT OF COVERING THE COURT—WHEN YOU STARTED, THE COURT WAS NOT RELEASING TRANSCRIPTS BUT EVEN ONCE IT DID, IT DIDN’T IDENTIFY THE INDIVIDUALS ASKING THE QUESTIONS, RIGHT?

Right. The “it doesn’t matter who is asking the question because there are no individual personalities on this Court” mystique—the myth of “there’s no difference between Scalia and Ginsburg.” That was what I was trying to fight. I tried to say it matters tremendously who’s asking the question, because these are real people with real politics and real agendas.

But you risk crossing the line into over-politicizing the whole thing, making it so that irreverence becomes its own end and not a means to an end and the Court becomes ridiculous. I want to be clear that I’m not unaware there’s peril in mockery and in taking everything too lightly, but I try to stay on the right side of that.

ANOTHER RISK, I TAKE IT, IN WRITING ABOUT THE COURT AS A COLLECTION OF INDIVIDUALS IS THAT IT COULD FEED THE CRITIQUE—OFTEN LEVELED BY RIGHT-LEANING JURISTS SUCH AS JUSTICE SCALIA—THAT THE COURT’S DECISIONS ARE SOMETIMES NOTHING MORE THAN IMPOSITIONS OF THE WILL OF FIVE UNACCOUNTABLE LAWYERS. IT SOUNDS LIKE YOU’RE SAYING THAT YOU WANT TO EMPHASIZE THAT INDIVIDUAL OPINIONS MATTER WHILE NOT GIVING UP ON THE IDEA THAT THE LAW IS ALSO DERIVED FROM OBJECTIVE SETS OF PRINCIPLES.

I think that if there were a broader bandwidth of voices talking about the Court, the truth would out. The problem is we don’t have that cacophony; we have a respectful whisper, like people narrating golfing shows. That’s the problem. So relative to the respectful whisper, I realize it looks like I’m jumping up and down and shouting. That’s a problem of circumscribed coverage.

HAVE YOU EVER BEEN SITTING THERE DURING ORAL ARGUMENT DYING TO ASK A QUESTION?

Yes. More than that, and this is present company absolutely excluded, there have been times when I wanted to leap up and say, “Sit down. You’re wrecking this for everybody.” I think reporters are really good at knowing when somebody is dying out

there. Sometimes there are lawyers who are just horrific and no matter how bad they are, you’ll never see it reported. It’s strange to hold your powder in moments like that. If you were watching a baseball game and the pitcher just lay down on the ground and refused to pitch, you’d write it.

WELL, IF IT WERE A TRIAL, YOU’D WRITE IT. WOULDN’T YOU?

I think so.

BUT NOT A SUPREME COURT ARGUMENT.

It’s a very weird thing. Here’s the nut of it—there’s a way in which we’re very, very aware of ourselves as being part of this grand constitutional process—and just as there’s supposedly no difference between Justices Scalia and Ginsburg at oral argument, there shouldn’t be a difference between good oral advocates and bad oral advocates, because that would suggest that the advocates make a difference and we aren’t supposed to believe that.

There is a duality about reporting the law as something other than just pure politics and horse-trading. We can’t quite figure out where we come down on the spectrum: on the one hand reporting it as politics or on the other as some kind of lofty holding that endures for the ages because it was made by a very different process than the sausage-making machine of the legislative branch. We ping between those two poles.

AND AS FAR AS CALLING THE JUSTICES THEMSELVES ON THEIR QUESTIONING, THAT’S COMPLETELY TABOO. WHY ISN’T THEIR OWN CONDUCT DURING ARGUMENTS FAIR GAME FOR REPORTERS?

I’m trying to grow a stiff enough spine to write the piece about this. I think one justice in particular has crossed over the line into advocacy and it’s unbearable—or very hard to watch. But nobody calls him out. And so few people are privy to the Court. Again, it’s the reverence and tradition. This is another argument for cameras in the courtroom. But I guess the answer is if there’s a critical mass of people seeing it, it’s only a matter of time before it starts to get written.

IF YOU COULD UNILATERALLY IMPOSE ONE CHANGE ON THE COURT, DO YOU HAVE IN MIND WHAT THAT WOULD BE?

And you don’t mean six different faces?

I DON’T MEAN CHANGING PERSONALITIES.

You’re going to squawk, but I think I would say cameras, gavel to gavel. More than any other thing, their absence is the most unfair, inexplicable, and antidemocratic.

CERTAINLY THE PUBLIC WOULD HAVE A GREAT BENEFIT FROM SUCH COVERAGE. WOULD IT CHANGE THE COURT’S WORK FOR THE BETTER OR IN SOME OTHER WAY?

I think that the people who are inclined to grandstand would

grandstand and then the people who are inclined to be under the radar might be spurred to speak a little bit, if there was some consequence. I don't believe, just from hearing the state court experiments with it and the lower court experiments with it, it would turn into all Ito all the time, as in the O.J. fiasco. I think that's a wrong-headed argument. But I think it would take awhile to normalize. And I don't think Americans would watch it instead of *Dancing with the Stars*. But the people who really care about the Court would have access to the Court and that would be great. The notion that little snippets are going to be taken out of context is just perverse because little snippets are taken out of context in print reporting. So there's no principled argument against it.

**AS A SOMETIME ADVOCATE, I DON'T THINK I WOULD DO A SINGLE THING DIFFERENTLY IF I KNEW IT WAS BEING FILMED.**

No. The notion that advocates would start barking like seals is an insult to the people who argue there. This isn't MTV. These aren't people whose livelihoods depend on making an impression on the public. The reasons against cameras are so painfully bad, and the idea that the Court is making its decisions out of its own narrow self-interest is doubly egregious.

**DO YOU THINK THAT THE JUSTICES READ YOUR ARTICLES?**

The justices that I've met have all known who I am and have been really nice. I think Justice Stephen Breyer (BA '59) was probably the one who went out of his way to say that it was important that someone was humanizing the Court and that he loved that enterprise. But I think my writing took a serious turn for the worse the very first time I heard that. I think it was O'Connor '52 (BA '50), and her clerks got word back to me that she was reading me. My husband said that for a year afterwards every article opened with "Looking resplendent today, Sandra Day O'Connor." He said I was just so ridiculously smarmy that for a while he couldn't bear to read me. So I guess the answer is certainly the ones that I have met have said to me that they read my articles, obviously with maybe different levels of enthusiasm.

I try very, very, very hard not to let that fact affect how I write.

**YOU'VE WRITTEN A LOT OVER THE YEARS ABOUT JUSTICE SANDRA DAY O'CONNOR, A STANFORD GRAD HERSELF.**

**HOW BADLY DO YOU THINK THE COURT NEEDS ANOTHER WOMAN, OR ANOTHER STANFORD GRAD? OR BOTH?**

Absolutely! Clearly the Court desperately needs another Stanford grad or alternatively somebody who has been on the faculty. There is something to be said for Stanford insofar as it's not "inside the beltway"; it's not "my life experience was working in Washington, then working in the executive branch, and then working on the Court." I do think there's something to be said for the sort of wide-open spaces view of the western, rugged individualistic O'Connor. There is a geographic aspect that has fallen away. If truth be told, and I go back and forth on this, I am more interested in O'Connor as a pragmatist—as somebody who is a broker of deals and who has had real-world experience,

having served in the legislative branch as well as having hung out a shingle and tried a bunch of cases—than O'Connor as a woman. In other words, I think we desperately need another O'Connor, but not for the frilly cravat. Rather, her kind of very, very hardheaded, real-world approach is sorely missed on the Court right now. That said, I also feel the Court is a fundamentally different place with one woman as opposed to two.

**HAVE YOU SEEN A CHANGE IN JUSTICE GINSBURG SINCE JUSTICE O'CONNOR LEFT?**

She herself has said as much—that it's very hard to be the one woman, because then you become the proxy for all women. You see it in her writing, which has become much more explicitly female. I don't think that's a role she particularly cherishes or ever wanted. It has been forced upon her, which is interesting given that she came up from a very different place than O'Connor in terms of coming up through the women's rights movement, but I still think that she has only very, very recently come to a place where she feels either comfortable or the necessity of being really vocal about being a woman.

**SO WOULD YOU EVER WANT TO ARGUE A CASE? COULD YOU IMAGINE YOURSELF DOING IT?**

Of course, I'd love to. Yes. Not in front of this particular Court, because I think that for the first time in history there would be justices who set someone on fire. But otherwise I'd love to.

**DO YOU HAVE ANY PARTICULAR PROJECTS OR GOALS FOR YOUR WORK OVER THE NEXT FEW YEARS, ONES THAT WE CAN ALL LOOK FORWARD TO?**

I've got a book proposal in the hopper. It's hard to even contemplate writing a book about the Supreme Court after Jan Greenburg and Jeff Toobin had their go at it, but I'm trying to get a book going about covering the Court.

I really do feel I might be one of those lucky people who stumbled into the perfect job when she was 30 years old. Every once in awhile I ask myself whether this is what I want to be doing forever and ever. But I wake up every morning, and I'm so—happy. You must feel like this too, Jeff.

**I WAS GOING TO SAY, I FEEL THE SAME SORT OF GIDDINESS SOMETIMES.**

Yeah. I don't think many people get that. I can't quite fathom what would be as wonderful as this.

**MAYBE WE CAN TRADE JOBS FOR A YEAR SOMETIME.**

**YOU ARGUE A FEW CASES, I'LL WRITE A FEW DISPATCHES, AND THEN WE'LL TRADE BACK.**

And risk you mocking my hairstyle? I would never yield my pen to you after that column. This coming October will be my 10th year and every once in awhile I think, "What am I going to do next?" But I figure as long as I wake up every morning and I can't wait, then I should be doing what I am doing.

**IT WAS FUN CHATTING.**

*Listen to excerpts from this interview at:*

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