It is a great privilege to deliver this Maurice Rosenberg lecture. When Maury died, Ken Feinberg and I arranged with the then-Dean Liebman for this lecture series. Each of us making a modest contribution to get it started. All three of us had served as clerks to Judge Stanley Fuld. Some might suggest that this invitation is but another illustration of the rule that no good deed goes unpunished, but I consider it in the nature of a high honor.

Maury was Fuld’s first full-time law clerk. He came from a small upstate town, Oswego, whose other claim to fame was a Revolutionary War battle. He started a brilliant career here at Columbia Law School, interrupted by World War II, and was Editor-in-Chief of the Columbia Law Review. The then-Dean, Young B. Smith, chose Maury to be Fuld’s first law clerk, as was then the wont, and two years later the Dean touched me with his magic wand. It was in Fuld’s chambers
that the friendship between Maury and Gloria and Evie and me began.

For a few days when our careers as Fuld’s clerks overlapped, Maury tried to tutor me in elementary grammar, sentence structure, style, such as “every paragraph should have a topic sentence,” and other necessities for survival as a Fuld clerk. Based on Maury and Fuld’s tutelage, my main reference book is the thesaurus. The Court of Appeals for the Second Circuit probably sometimes wishes I would substitute its decisions for the thesaurus.

Since Maury and I were deeply involved, I thought it might be useful to briefly sketch the teaching of civil procedure as I knew it here at Columbia Law School from 1946, when I entered, to 2006, when I delivered my last lecture on Mass Torts in Jack Greenberg’s class. I apologize for not mentioning the many members of the faculty with whom I did not personally work who taught in related fields.

We started in 1946 with three hundred in one classroom; half of our curriculum was fixed; and there were almost no seminars. In Jack Greenberg’s 2006 first year procedure class there were only twenty-five students.
When we entered law school, Julius Goebel, in his development of legal institutions, taught the British medieval development of matters such as equity, a centralized court system, and the writs up until the reception in this country of British law and equity following the war for independence. Like others of his colleagues he used the Socratic method in a way which today might not meet Geneva standards against torture.

Professor Huger Jervey, a leader in the Columbia-based legal Realism school, taught Equity.

Goebel’s description of early procedure, as revealed in his teaching and his colonial research, provided a foundation for understanding present practice and how it could be utilized to obtain a just result - - or, I should add, an unjust result, depending on who is the paying client. In such matters as my asbestos, tobacco, gun, pharmaceutical, and other mass cases and in sentencing I have relied heavily on Goebel’s writings, citing him frequently.

More important, Julius showed us how profound changes in the economy and political system could be affected by the legal system, and visa versa. The
British substantive-procedural central court writ system of the 13th Century forward was a means of shifting jurisdiction from local baron’s courts to London. It represented a change from medievalism to the present national procedural system and rule of law that is the foundation for civil practice today in our own country - - with some complications because of federal-state issues. Such a sea-change is probably occurring today in our own systems - - though the wild cards of weather and religion make prediction difficult.

In the middle of the 19th Century, Field, with his Code, simplified the form of practice. His code, together with the encrustations of constant revisions, continued to be taught in classrooms here into the middle of the 20th Century. Classic terminology such as “demurrers,” as well as the more modern “motions to dismiss on the pleadings,” were standard in our classroom.

Our guide was Jerome Michael. He and Dean Smith were friends from Georgia. After practicing there and in New York, serving as a machine gunner in World War I, and working at the Department of Justice, he joined the faculty in the 1920s. He collaborated with the philosopher, Mortimer Adler.
What Michael did was develop a strict analysis of the essence of pleading, evidence, and litigation, independent of any procedural rules. He utilized a special vocabulary to emphasize the progression from the real world of events important to litigants, to evidence of those events, to material propositions of fact that could be manipulated through syllogisms and evidential hypotheses based upon the general knowledge of the trier, to ultimate operative propositions of fact establishing the necessary elements of a substantive rule of law required to obtain a remedy. This sounds complex, although it is not. His use of Greek symbols and a special Latin vocabulary did frustrate some of us. His seminar in civil trials - - the model for many later clinical seminars - - was taught with judges and litigators.

I took over Jerry’s workload when he died - - I need hardly add, with extreme trepidation. The seminar Walter Gellhorn taught, Problems in Current Civil Rights Litigation, was also turned over to me. Here, as in all my classes, the students - - including Ed Wesely who is here today - - generously taught me enough to get by.

Gene Nickerson, who clerked for Augustus Hand, Chief Justice Stone, and
Justice Black, and was my friend and mentor for many years (and who was a Columbia Law Review Editor in Chief) thought that Michael was the best teacher he had ever had at Harvard, Columbia, and America’s best private schools.

Paul Hays joined the faculty in the 1930s. In a Second Year class he taught the Federal Rules of Civil Procedure adopted in 1938. They were just really beginning to be understood in the mid-1940's. The new rules integrated prior equity and law procedures, emphasizing open discovery and a flexibility that provided an enormous advantage to potential plaintiffs. Paul was the chair of the state Liberal Party. When David Dubinsky, the union chief who ran that Party, went to see President Kennedy about an appointment for Hays to the United States District Court, the President said that he had bad and good news. The bad was that Paul couldn’t make it to the District Court, because he had no court experience—he had taught classics and then law at Columbia. The good news was that you didn’t need to be a litigator to be on the Court of Appeals, so Paul was appointed to the Second Circuit Court of Appeals.

In the fifties, I was in the midst of revising the New York practice and I wanted to put more state procedure into the national rules-based courses we were
teaching. A curriculum revision required cutting procedure and equity from 12 points to six - - and soon abandoning Goebel’s history course. To accommodate the changes, Maury and I wrote a new civil procedure casebook integrating much of the work of Goebel, Michael, Jervey, and Hays. Later that casebook included as authors Columbia’s Hal Korn and Hans Smit.

Hal was the director of research on the revision of New York practice which involved our joint writing of studies, the new rules and statutes and a multi-volume treatise and manual. We had the help of scores of Columbia Law School students, including those who became Professor Margaret Berger, Professor Dan Distler and Judge Felice Shea as well as Professor Arthur Miller of Harvard who was then teaching here. To read one of Hal’s reports was like coming onto a limpid stream after struggling through brambles in the woods. Unfortunately, his early death left us with only a few articles rather than the comprehensive treatise on jurisdiction he had in mind.

Hans seemed mainly interested in the international aspects of procedure, particularly arbitration. He moved part of the Columbia faculty to Holland each summer where in the post-war years it taught American practice to the world’s
Maury with Willis Reese, worked in conflicts of law and its effect on practice. Their studies influenced Stanley Fuld’s path-breaking conflicts decisions that revolutionized the American law of conflicts by emphasizing as critical the dispute’s center of gravity. I am afraid that my own rather radical ideas on conflicts of law in mass torts might have led Willis to revoke the extraordinarily generous grade he gave me in his course.

After I finished my writings and was appointed to the bench, it was mass actions that took my particular fancy. I’ll say more about that in a moment.

There are a number of teachers whose work affecting procedure I must acknowledge. I had the pleasure of sharing their courses. They include Jack Greenberg, who is interested in litigation as a method of protecting minority rights in this country; Ken Feinberg, and Hal Korn, who helped teach mass tort litigations here; Kent Greenawalt on equality in substance and procedure; Margaret Berger on science; and Arthur Murphy on modern tort law. Sam Issacharoff’s work on conglomerate actions here and at the American Law
Institute was the basis of an opinion I issued this week that broke some new ground.

Increasingly, procedure needs to be embedded in diverse substantive courses as in securities, intellectual property, family law, international law, and civil rights litigation. The 1938 Federal Rules’ attempt to provide a single trans-substantive procedural paradigm is gradually breaking down.

Nevertheless, compared to the top-down administrative systems abroad, ours is still largely a bottom-up, lawyer based, litigation model, with a common law bias, designed to protect individual rights and property through private initiative. Restitution in criminal law, disgorgement in administrative law and a variety of legislative actions are gradually sapping this private approach.

We now have a powerful well-capitalized plaintiffs’ bar which can advertise and assure equality in the courts. The development of the class action into areas probably undreamed of by Ben Kaplan when he drafted revisions to the new federal rules in 1956 illustrates the point. Ben, who taught at Harvard, was a Columbia Law School graduate, quite close to our school.
In Agent Orange, DES, asbestos, pharmaceutical, civil rights, school, prison, cigarette, gun, social security, family abuse and other mass actions, the intersection of substance and procedure was sharply brought home to me as a judge and in my later teaching years. Procedure profoundly affects rights-in-fact, particularly those of our less well situated Americans. Sometimes special problems, such as drug and family abuse, require a new form of integrated courts that combine civil, criminal, social services and mediation practice.

To understand the present status of what can be referred to as rights redemption and protection through the law, we would have to canvas the criminal law, administrative law, procedural law at the state and federal level, mediation and arbitration, and substantive law in all its current developments, with roots going back into medieval archaic law and equity, as in the present gun nuisance and asbestos trust cases; and new shoots going forward to transnational areas, as in intellectual property.

In current litigations in our rapidly changing technological, sociological and political world, what is required – in the absence of specific legislation – is a firm, yet sensitive, control by the judiciary of litigants and their lawyers, whose actions
in court affect so many people and so much of industry. Supervision when ethical issues arise, and control to make sure that wider populations and classes are not adversely affected, is essential. Sometimes legislatures have stepped in, as in the child vaccine cases, to offer a solution in special cases; that is good in our democratic society. In most instances, judges have been left to balance the complex polycentric issues.

Judicial control must be exercised not only where the law explicitly requires it, as in class actions, but also in mass private individual settlements, such as in the recent Zyprexa pharmaceutical cases where I have limited attorneys fees and helped provide matrixes to deal with compensation on a mass basis. The vexing problems of differing views of liens by the 50 states, private providers and the federal government for medicaid, medicare, workers compensation, and the like provide enormous hurdles in conducting mass litigation without excessive transactional costs.

Cases such as Zyprexa or Agent Orange often require substantial ad hoc institutions. In Zyprexa, for example, we are using a special master for discovery, four special masters to allocate individual recoveries to over 8,000 claimants, an
escrow bank, and a designated independent law firm to negotiate and administer lien allocations to the federal government, fifty states, Puerto Rico and the District of Columbia.

Perhaps I may be permitted to end on a personal note that also makes a minor jurisprudential point. Judges, and perhaps particularly trial judges, are affected by their backgrounds. Obviously, they should try to rise above those backgrounds when it comes to stereotyping of race, gender, and occupation and strive, as the Bible and our oath of office instructs us, to treat all alike, rich and poor.

My decisions in both substantive law and procedure reflect what some might characterize as a tendency to ensure that the “little guy” is treated fairly by the legal system—that he not go without justice because he lacks power and know-how. The rich, powerful, and well-advised can usually take care of themselves; they and their attorneys generally are skilled in using institutions, including the courts, to their own advantage.

I come, essentially, from a working-class background, with parents who
were forced out of school in their early teens to do menial work. I had relatives who escaped from the Holocaust by coming here illegally in the 1930s, after the passage of discriminatory legislation in the 1920's designed to keep from our shores them and others of my relatives who were ultimately killed by the Nazis and their allies. I saw people lying in the streets in the late 1920s and early 1930s because they had no place to live. I saw how workers — particularly Blacks — were demeaned when I worked for a freight company while going to college at night. And, I fought freedom’s destroyers in World War II.

So, naturally, when it came to immigration cases, I’ve tried to protect immigrants against injustice. When it came to cases involving minorities and the poor, I’ve tried to devise procedural and substantive means to protect individuals against unfairness by the government and against the powerful in private life—through habeas corpus, class actions, consolidations, and other legal devices. That background has affected my decisions in education, torts, discrimination, prison and other cases.

Particularly after World War II, with statutory protections of civil rights, Brown v. Board of Education and other Supreme Court cases, welfare and medical
protection for the poor, and the like, the pendulum was swinging towards equality. The country seemed devoted to equal opportunities before the courts and in the real world.

In the past 20 years or so, there has been a partial reversal, away from the poor, both in procedure and in substance. Limits on what Legal Services and pro bono groups can do to level the playing field is especially regrettable.

This current swing towards the powerful duplicates repeated cycles of struggles against injustice and inequality that our country has gone through since before 1776. We must act on the belief that the balance will be transformed yet again by our alumni and others like them.

But, in the short run, having been almost miraculously vouchsafed positions of responsibility which I treasure—first as a member of this faculty and then as a federal judge—I feel called upon by my genes and experience to help stave off what I consider the greatest threat to our morality: a cold-hearted denial of support for the disadvantaged in the physical, emotional, and social realms required for dignified lives.
I thank you, my dear brothers and sisters of Columbia Law School, for the privilege of working with you over the past sixty years to protect and advance the rule of law.

ADDENDUM: QUESTION BY LYNCH & PLANNED ANSWER

The answer to the question regarding decreased use of civil and criminal jury trials:

Criminal trials are a matter unto themselves—Judge Lynch is better equipped to discuss them.

As to civil trials, Professor Marc Galanter has found that the proportion of civil trials to civil dispositions fell from 11.5 percent in 1962 to 1.8 percent in 2002, part of a long historic decline. The decline in proportion to population is also substantial. See Marc Galanter, The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts, 1 J. Empirical Legal Studies 459 (2004). Federal bench trials declined even more than jury trials. Id. at 567.

I believe there are a number of factors:
(1) The great expense of litigation;

(2) Expanded and more efficient discovery, which usually makes clear who should win and, if recovery is appropriate, how much it should be;

(3) The increase of mediation and arbitration services both in court and out;

(4) The frequent resolution by administrative agencies of many matters (e.g., SEC and consumer safety) in which they can impose fines;

(5) Specific legislation capping damages and (as in New York State) restricting damage awards to those plaintiffs who can prove substantial injury;

(6) The maturation in many legal subfields, where attorneys understand what cases are worth, because of the availability of information about other cases and the development of specialized bars;

(7) Compulsory settlement procedures to deflect cases from the courts (e.g., employment and brokerage arbitration agreements)

(8) The reluctance, particularly of appellate courts, to allow juries to decide cases—by much increased use of summary judgment, motions to dismiss, and reversal on appeal; and

(9) The increased difficulty of sustaining a complaint in certain fields because of, e.g., specialized pleading requirements, as in fraud cases.