

KEYNOTE: OTHER PERSPECTIVES

MODERATOR:

Norman P. Stein, Professor of Law, Drexel University School of Law

PANELISTS:

David Cay Johnston, Syracuse University lecturer and former reporter, The New York Times

Ellen E. Schultz, investigative reporter and editor, The Wall Street Journal

Mary Williams Walsh, reporter, The New York Times

Norman Stein: We have a wonderful lunch panel to compensate for the modest box lunches: The nation's three most astute and thoughtful journalists on employee benefits: Mary Walsh, who is a reporter for *The New York Times*; Ellen Schultz, who was a reporter and editor for *The Wall Street Journal*, to which she still contributes as a special correspondent, and the author of *Retirement Heist*, which is a great read aside from being really a terrific book; and David Cay Johnston, who covered tax and pensions for *The New York Times*, is the author of several award-winning books, including *Perfectly Legal*,¹ is a regular columnist for *Reuters* and also teaches law classes at Syracuse University. David and Ellen are recipients of the Pulitzer Prize, Mary was a Neiman Fellow at Harvard and those of us in law know what a singular honor and privilege that represents.

To start, I have some short questions that I hope and expect will call for longer answers. And then, I would like to give the panelists a chance to ask their own questions of the other participants in today's program. First question: How, among the myriad of employee benefits issues, do you decide what's the most important?

Mary Williams Walsh: I can answer that. The thing that *The Times* does not want are down-in-the-weeds stories, which means stories that get into all of this intricate detail that I was so interested in

1. DAVID CAY JOHNSTON, *PERFECTLY LEGAL: THE COVERT CAMPAIGN TO RIG OUR TAX SYSTEM TO BENEFIT THE SUPER RICH – AND CHEAT EVERYBODY ELSE* (2003).

hearing about this morning. That doesn't go into newspaper articles, and if I tried it won't get into the paper, or if it somehow did get into the paper, it would be buried somewhere and hardly anybody would read it. *The Times* very much likes things to be palpable, and so lately I've been writing a lot about public pension plans, and in a case like that it's good to pick an individual city where something has happened with their municipal pension fund, or if you can describe how a story affects the way people live, the editors like that. When the PPA [Pension Protection Act of 2006] was being enacted,² then I could get a lot into ERISA issues by learning about the pension accounting and the standards that apply to companies. That is a difficult story. As soon as I started looking at cities and their municipal pensions, I saw that none of those impenetrable stories were there; I started thinking that was the better story.

Ellen Schultz: I agree with Mary that you have to think about what the editors are looking for in stories before you think about what the reporters want. As you probably have noticed in the broadcast and in magazines it tends to be top down. The editors get together and they think about what they've read and what they've heard at the gym or the country club and they have an idea and then they go to the reporters and they say, "Do this story." And sometimes the facts actually correspond with what the editors think is the story, sometimes not. At *The [Wall Street] Journal* it's primarily been, in the past, a bottoms-up kind of structure, where the reporter is expected to come up with a story—to go out and actually find out what's going on.

The trick with that is if the information is new, especially if it's complicated—I mean new to the editors—they have to be convinced. I remember trying to convince editors to let me do a story on ERISA's preemption of state law, and the editor's problem with it was: "Well, I've never heard of that. Are we sure?" Another was subrogation of torts under ERISA—that was also a challenge because the editor hadn't heard about it—and social security integration.

You also have to work with the editors' worldview and their background. *The Journal* editors had no pensions, so convincing them that stories about pensions were important took a bit of work, because as many people now say, "But who has pensions anymore?" And you say, "forty-four million people at least."

2. Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (codified as amended in scattered sections of 26 and 29 U.S.C.).

There's also an attitude you need to get past. Plaintiffs' attorneys—reflexively some editors have a negative attitude towards them, not considering that perhaps defense attorneys also have a financial incentive for their point of view. And there can sometimes be antipathy towards unions or public employees or low-income people that you have to get past. The way to get past it, I found, was to do stories that focused pretty much on current news, meaning that you had to find a news peg for something, whether it was legislation being introduced or a lawsuit of some significance being filed. The second was to look at the financial underpinnings, so if you could make a good business story out of it and show how someone's making money at someone else's expense, that was a way to sell the story. Those are the filters I've worked with. David?

David Cay Johnston: Let me play off Ellen's point there—there's a saying in newsrooms that "News is what happened to an editor." When I started out at the *San Jose Mercury* when I was nineteen years old as a staff writer—the youngest writer there in 1968—the newsroom was full of what I would call blue-collar intellectuals. Today it's full of people who grew up very comfortably, went to very good schools, and therefore really aren't interested in, don't understand, and have no connection to the problems of the vast majority of people in this county.

One of the leading reporters at *The New York Times*, I recall when he was newly hired, was complaining on the phone—he sat next to me—about the fact that his graduation gift from Harvard wasn't the model Lexus he thought Daddy was going to give him.

The fundamentals of what are important stories in employee benefits are, number one: is it explainable? I don't think there are very many editors who could explain subrogation. "Fiduciary duty? What are you talking about? Fidu-what?" The story, therefore, needs to be gettable. I have a list at home of one hundred important stories that I think ought to be done, and my estimated time it would take me to do them. Many of them are two-year projects, and practically they're just not worth the time to do them. So 'get-ability' is a very important factor.

But most importantly are people. You've got to have people. I knew in 1989 that the way the minimum tax had been repealed and replaced with the anti-family alternative minimum tax was going to be a disaster for many people, but it took me until January of 1999 to

find a family that illustrated that.³ When I wrote about 401(k) thefts, I needed the people who were stolen from and their bosses to be able to write about them. When I wrote about what Global Crossing did to the telephone workers in Rochester,⁴ which is one of the stories in *Perfectly Legal* and there are pension stories in the subsequent two books in that series: *Free Lunch* and *The Fine Print*,⁵ I had to find people.

You have to find people to illustrate these things. Ordinary Americans don't care about policy, but they relate to stories and that's the importance of the story that was told today about how there was no constituency for ERISA, except the people. To the extent that news no longer is about the people, there's no constituency for real reform and real change.

Norman Stein: Part of this, I think, we just talked about, but are some stories simply too complex to be captured by the press? By the popular press at least?

Mary Williams Walsh: I can say right now, multi-employer pension plans, it's something that's out there and it's really important and that part of the PBGC [Pension Benefit Guaranty Corporation] program is having a lot of strain and the thought of trying — our articles have to be shorter today than they used to be, just in my time at *The New York Times* — the thought of even having to explain what a multi-employer plan is, because I think our readers won't really know, and then the fact that it's regulated in a different way from single-employer plans and that it has different funding standards — it's like what David said, you start thinking, "Well, I can't really do that so I'm just not going to." That's the kind of stuff that goes on. It's too complicated.

Also, the actuarial stuff, which interests me very much with all sorts of pension plans. If I try to talk about it — even if I use a word like "risk pool" — no one knows what I'm talking about in the news-

3. David C. Johnston, *Funny, They Don't Look Like Fat Cats*, N.Y. TIMES (Jan. 10, 1999), <http://www.nytimes.com/1999/01/10/business/funny-they-don-t-look-like-fat-cats.html>.

4. David C. Johnston, *Pension Agency Plans Filing to Aid Global Crossing Workers*, N.Y. TIMES (Nov. 25, 2002), <http://www.nytimes.com/2002/11/25/business/pension-agency-plans-filing-to-aid-global-crossing-workers.html>.

5. JOHNSTON, *supra* note 1; DAVID C. JOHNSTON, *FREE LUNCH: HOW THE WEALTHIEST AMERICANS ENRICH THEMSELVES AT GOVERNMENT EXPENSE (AND STICK YOU WITH THE BILL)* 22, 161, 205, 262-73, 285 (2008); DAVID C. JOHNSTON, *THE FINE PRINT: HOW BIG COMPANIES USE "PLAIN ENGLISH" TO ROB YOU BLIND* (2012) [hereinafter JOHNSTON, *FINE PRINT*].

room. And it's not that I'm dealing with people who are unsophisticated. It's not trying to be a financial newspaper, so these are the kinds of things that are definitely too complicated.

Ellen Schultz: You've probably noticed what I call the "Bloombergization" of news, and if you're not aware of it, the big push has been to be first with everything. Be first by two seconds even, or one second. And they do count that at places like *Bloomberg* where people have little report cards sort of keeping score. Did you beat *Reuters* by a second? They get judged that way. That's the way that much of the media is going. It's who is there first with the story. Now, what happens when you're worried about nothing but speed is that you sacrifice a few things like, well, nuance and accuracy. Try to report on, say, *Frommert*⁶ or *Amara*⁷ with five-seconds notice. What kind of a story can anybody put out on the significance of that? So they're left with doing a he said/she said, which is always a very unsatisfactory kind of story.

The other problem is you're serving two different audiences with this approach: One is just the eyeballs audience that they want for the online editions, which is, "Get their attention with anything." So that's going to determine what story they do and how they do it. The other is traders, which you may not realize but the whole reason that *Bloomberg* exists is in order to sell their terminals at several hundreds of thousands a year to traders, and the trading community wants to get the news seconds before anybody else does, because that's what they're going to base their bond trades on—not on nuance or analysis—and so forth and so forth.

So you have the investment community and you have the rabble, so to speak, that are the targets for this hastily produced news. So that leaves people trying to do stories on complex ERISA issues sort of struggling and having to be creative. The only way I was able to sort of do it was to anticipate when there was going to be an important ruling coming up and then spend weeks trying to understand the law and talk to the right people so that when the story did break, and I had a reason to do the story, I'd have some credible chance of getting most of it accurate and timely.

David Cay Johnston: Ellen has hit upon a real corrupting influence in our society. *Bloomberg* does literally rate its reporters based

6. *Conkright v. Frommert*, 599 U.S. 506 (2010).

7. *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011).

on what's called "market moving." Where do those stories come from? Well, from people who then make high-speed trading profit off of them. It is utterly and completely corrupt and the year I spent as the global economics columnist to *Reuters* brought this home to me in very troubling ways.

There's no story that's too difficult to put into print, but you have two problems: One is the number of journalists in America who understand the concepts that are essential to writing about employee benefit plans is not much larger than the number of people sitting at this table. It's really a very small number. Most journalists know how to quote people accurately but often have absolutely no idea what they're writing about. Or as Seymour Hersh has said, "You pick up *The New York Times*, you can read the most incredible journalism human beings have ever produced in one column, move over one column more: Pure crap."

One of the keys to doing this is using your own language. I've covered complex regulatory and law enforcement issues for almost fifty years and I have said, "The heck with the language of these folks." Devise your own language. So fiduciary duty – it's a duty of loyalty to your customer. People can grasp that – you have a duty of loyalty. And in that sense the business of benefits, what I heard most importantly this morning, especially from Frank Cummings, was that the way we think about pensions depends on the language. The idea that a pension is a gratuity. The idea that pensions are fringe benefits. Excuse me, but pensions are real pay. How you divide up the pay between cash and vacation and pensions and other things, it's all pay and you give an employee a pension and they get less of something else. It is not a gift from a generous employer.

If tomorrow it turned out that every big corporation in America suddenly only gave people eighty-five cents of their pay, not only would it be a scandal, but the wage and hour laws would very quickly and efficiently provide you with a way to deal with it. By the way, here's how ancient they are – because I teach the business regulatory and tax law of the ancient world – one of the things my students study is a trial held in 1454 Before the Common Era in Egypt before a wage and hour court. They just didn't call it that.

When people aren't getting their pensions because the pension wasn't funded, I don't understand why this is not seen and treated by all of us as: that's a criminal action. That is stealing. That is not paying people their full compensation. That we've allowed all these complex legal concepts to come along violates the fundamental principle: compensation is compensation is compensation, and if

you're putting too little money into the pension fund, then you're cheating your workers. The only reason people don't know that is it doesn't appear on the pay stub. If they had to put on your pay stub "This week's contribution to pension" and it was anything less than that, people would know about it. Very simple disclosure reforms like that could have a powerful effect.

Are their stories too complicated? Yes. Mostly because most journalists just don't understand how the world works. Secondly, it's important the language you use, and we shouldn't talk about contributions. Governor Scott Walker said and *The New York Times* publisher Arthur Ochs Sulzberger quoted him as saying – and I wrote a piece criticizing him for this in *Tax Notes* – that Wisconsin workers should contribute more to their pensions.⁸ The only contributions to the pensions of Wisconsin state workers come from the workers. Of course all sorts of people immediately wrote me letters saying, "No, it comes from the taxpayers," and I said, "I'm sorry, no. The taxpayers exchange their money for the services of the state employees. The only source of money other than market gains in a pension plan come from the workers." And we've got to get away from this language that implies that it's a gratuity.

Mary Williams Walsh: What about when they're funding past market losses, though? That's taxpayer money.

David Cay Johnston: It's not taxpayer money if there are market losses. If you have a properly-funded pension plan and you have the right accounting rules, then the money all comes from the individuals. If you didn't put enough money into the plan, if you did what New Jersey did, you stopped funding the plan under Christine Whitman so you can give tax cuts to well-to-do New Jerseyans,⁹ then you weren't fully compensating people.

There's nothing unsound about pensions. The only thing that's unsound about pensions is the rules that let people avoid funding them on an economically sound basis. But we shouldn't confuse economics and accounting. Economics is the amount of money you earn. Accounting is how you divvy it up.

8. David Cay Johnston, *Really Bad Reporting – Wisconsin Collective Bargaining Dispute*, THE HUFFINGTON POST (Feb. 24, 2011, 3:39 PM), http://www.huffingtonpost.com/david-cay-johnston/really-bad-reporting---w_b_827841.html.

9. See David Cay Johnston, *A Hard Lesson from Motown: They Will Steal Your Pension*, NEWSWEEK (Dec. 4, 2013, 12:27 PM), <http://www.newsweek.com/hard-lesson-motown-they-will-steal-your-pension-210401>.

Mary Williams Walsh: So you're saying don't invest in something where the value can go down.

David Cay Johnston: No, not at all. Values can go up and down, that's why we have five-year accounting rather than—you know it's merely a convention that we account the way we do by time periods. We do tax returns on a yearly basis in America, in China—and I filled out a Chinese tax return, it took literally thirty seconds—it's done on a monthly basis. You pay each month. It's merely a convention that we do things on an annual basis. Over the long haul a properly funded pension is a perfectly sound investment. It can go up and down. The amount of money you have to put into it you can calculate. We do that for every single worker in a pension plan. Your age, your compensation, your expected future increases, all go into a formula to calculate what we're going to put into that plan for you if we do it properly.

Norman Stein: I have some other questions, but I promised the panelists that they would have an opportunity to do something that panelists don't generally do, which is ask questions of the audience—the people who have been talking this morning about ERISA and the history of ERISA. I also know that there are probably a few people who want to respond to the conversation on funding, so [addressing the panelists] are there questions that you'd like to ask?

Mary Williams Walsh: I have a question and it's because I've been looking so much at pensions in cities or states and seeing that some of these situations are really terrible, and then when you look at who did the terrible things, sometimes its legislators. It's not somebody stole the money, it's that they just voted year after year after year to use a crazy funding method that cannot really work in the long run. You get to a place and then you find out that some of the people in these plans are not covered by Social Security and it makes it an even harder problem to solve. Detroit is a really good example, innocent people are going to get hurt before it's over. They already have been hurt.

I keep thinking that there needs to be some sort of oversight that doesn't exist. I'd be really interested in knowing if people who have been in Washington and talked about this, is anybody thinking about this at all? There is all this attention to fiscal and indebtedness matters on the national level in Washington now, but I see whole

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other layers of the same thing at state and local levels and I don't have any sense that anybody's looking at it in a kind of systemic way.

Russell Mueller: After ERISA was enacted, the Congressional pension task force continued and part of their study and oversight was the exception to ERISA for public-employer retirement plans. The Task Force produced a 1978 report.¹⁰ We reported for the first time a census of the public plans in the country, including the federal plans. By the way, there were fifty-one of those alone. I developed a questionnaire getting the actuarial information in such a manner that it could be compared: plan-to-plan, jurisdiction-to-jurisdiction.

The report had all of the information in it, including the fiduciary abuses that existed in these governmental plans and following the report, Congressmen John Dent, John Erlenborn, and Phillip Burton introduced legislation that was originally much like ERISA, but was called PERISA. Because of Tenth Amendment issues, the legislation was limited to reporting, disclosure, and some additional issues regarding funding where there would have to be some accounting.

There would have had to be some accounting and actuarial disclosures. All of that went by the wayside unfortunately. Today we see exactly what lack of attention to this issue and the types of problems our failure to address these issues has created. But the problems were known then. Hamtramck, Michigan had gone into bankruptcy, now it's Detroit. New York City, as Al Lurie can tell you, had some issues. They didn't want to contribute to the NYC plan, in fact, they wanted to take assets from the plan to fund the government.

Al Lurie: With New York, it was literally the city wanting to borrow from the pension plan.

Russell Mueller: Yes, to borrow, yes, to borrow. And there was a tremendous amount of opposition to that, as you can imagine from retirees who saw their security slipping away.

Frank Cummings: In a context of a completely dysfunctional Congress where nothing is going to happen that is the least bit controversial, how would you go about taking on the opposition of fifty governors? It's like saying it's impossible because it's controversial

10. STAFF OF H.R. COMM. ON EDUC. & LABOR, 95TH CONG., PENSION TASK FORCE REPORT ON PUBLIC EMPLOYEE RETIREMENT SYSTEMS (Comm. Print 1978), http://archive.org/stream/pensioce00unit/pensioce00unit_djvu.txt.

and then let's make it doubly impossible by inviting the opposition of every state governor. It just ain't gonna happen. What could be done, but won't be done, is to finesse some of those problems by doing it through the Internal Revenue Code.

The difference between doing it tax-wise and doing it through the Department of Labor is, for those of you who are students of Immanuel Kant, that Title I of ERISA is a categorical imperative. It says, "Do it." Title II of ERISA, which is the Internal Revenue Code, is hypothetical imperative. If you want this favorable tax treatment this is the way you get it, but you don't have to do anything. I'm setting aside the excise tax part.

So you can sort of sidle up to some solutions to the problem by saying, "Well, we'll condition our favorable tax treatment for the beneficiaries of municipal plans." We'll condition our favorable treatment to trusts for the beneficiaries of municipal plans, by saying, "Well, they're all going to owe us taxes unless they do this or they do that." That's arguably, at least, constitutional, because it's in fact the law now. But the chances of Congress doing anything serious about the problems in Detroit or similar things to come, politically, are just silly. I mean, if you're going to spend your time arguing about how to get that done, first figure out how you can get anything done on Capitol Hill and anything easy done on Capitol Hill, and after that try the hard stuff, but it is just absurd to think that Congress can legislate solutions for state and municipal plans.

Karin Feldman: If you want to talk about public state and local government plans, remember that less than ten years ago most were funded reasonably well and today it is all down to focusing on one moment in time when markets are bad and interest rates are low, which doesn't really tell you the true story about a pension plan's long-term viability. You have to look at it over a long period of time and whether they're being responsibly funded or not over that period of time.

In some of the articles that I've read, the media is doing a disservice to the survival of public plans, the implied criticism and the blame-the-worker ethic, it's quite frankly some of the most aggravating reading that I see because the media seem to think that a modest retirement plan is a boondoggle for workers and that somehow the workers are responsible for high taxes—these were decisions made by the state legislatures to not fund the contracts they made with their employees. There were rules for funding, there were good practices courtesy of the Government Accounting Stand-

ards Board—the accounting rules were also used as a funding method. Of course now with other pressures, the new reporting and disclosure rules under the accounting rules can no longer be used as funding rules.

David Cay Johnston: Karin, the reason you're seeing that kind of news coverage though is this problem that's happened that newspapers used to be a mass medium and were widely read and now, you know, my home delivery of *The New York Times* costs me \$70 a month. The audience has changed and it's being reflected in that and there is a clear elitist bias. I say this as somebody who writes press criticism.

I'm the only journalist in America who has caused broadcasters to lose their licenses for misconduct.¹¹ I write a column in the *Columbia Journalism Review* critiquing the work of my peers and the degree to which the voices of those who are powerful are being heard is enormous, as opposed to the voices of those people who are affected by these policies.¹² It is a very core problem and this notion that a pension is an add-on, it's an extra, it's a gratuity, is reinforced constantly in the news and eventually it's going to be treated as if that were the truth.

Karin Feldman: And the notion that a defined benefit pension plan has to be 100% funded every single day of its life is nonsense.

David Cay Johnston: The one way that we can change that is if we had a rule that said the following, I think. Some of you who are lawyers may find this troubling, but a 401(k) plan is a trust that is separate from the company, and it's not in the company's books. Well, why shouldn't the DB [defined benefit] pension plan's benefits be a separate trust, not on the company's books, and the only thing that would appear on the company's books would be the contingent liability, because we have ups and downs in the market. Therefore,

11. *About Us*, NEIMAN WATCHDOG, <http://www.niemanwatchdog.org/index.cfm?fuseaction=about.viewcontributors&bioid=134> (last visited May 29, 2014). In 1973, while he was an investigative reporter for the *Detroit Free Press*, Johnston exposed news manipulations and blackouts at WJIM-TV in Lansing, Michigan, that ultimately forced the sale of that station and five others after the Federal Communications Commission forced the station off the air. See, e.g., David Cay Johnston, *Tax Favors, IBM, and the Murder of Vernon Hunter*, HUFFINGTONPOST.COM (Mar. 3, 2010, 3:33 PM), http://www.huffingtonpost.com/david-cay-johnston/tax-favors-ibm-and-the-mu_b_484418.html.

12. See *Author Archive – David Cay Johnston*, COLUMBIA JOURNALISM REVIEW, <http://www.cjr.org/author/david-cay-johnston-1/> (last visited May 29, 2014).

companies would have an incentive to fully fund or overfund these plans because if they didn't, they would have to build up a reserve on their books that's particularly large to deal with potential short-falls.

That would fundamentally alter—remember all the companies that were reporting at one time profits bigger than the operating profits of the company—Mary wrote about this and I'm sure Ellen did—because of the assumed returns to their pension plans when the companies really weren't making much profit. I mean, there are lots of accounting problems; I teach graduate accounting students about how the real purpose of the modern accounting rules is not to provide a reasonable picture of what a company's doing, but to hide the unreasonable thing that it's doing.

Ellen Schultz: I agree with you.

Jeremy Gold: Frank Cummings just asked what could you do? And of course he's right—that in today's Congress there is nothing you can do about anything. But among the things that aren't being done, I want to highlight one. It is H.R. 1628/S.779, the Public Employee Pension Transparency Act [PEPTA], which some people say is a vicious right-wing conspiracy, but it is not. I support pension transparency very strongly and I'm a Democrat.

One of the things that Congress does in terms of using the Internal Revenue Code is the tax exemption for municipal bonds, which is a gift from the federal government. It does not go to the states directly, it goes to those who buy municipal bonds, but it reduces state borrowing costs. Nothing since the Income Tax Amendment of 1913 would have required that municipal bonds be tax-exempt. Thus control of the municipal bond tax exemption is a very direct way for Congress to impose standards when it wants to impose standards.

Using the threat of loss of the tax exemption, PEPTA demands important disclosures with respect to public pension plans. The bill requires the annual disclosure of the value of accrued benefits using a treasury yield curve. Today treasury curve rates are very low, but in 1981 those rates were in excess of 13%.

PEPTA would expose all the fluctuations in benefit values, which some insist are irrelevant. Many market participants, however, including those who have to make decisions about whether or not to hedge these liabilities, would be well informed.

Actuarial smoothing doesn't do this—smoothing is a very poor substitute for good risk management. Hiding risk is not managing

risk. Disclosing the true state, even if it's highly volatile, is merely the first step towards understanding the weaknesses in the way that actuarial and accounting methods treat pension plans, especially public plans.

Frank Cummings: Before ERISA passed, someone mentioned that Edwin Newman, I think it was, did this white paper documentary for NBC, *The Broken Promise*.¹³ At any rate he decided one day, and I went with him, to go out to Silver Spring, Maryland, a suburb of Washington to go and see the Department of Labor depository where all the annual reports under the Welfare and Pension Plans Disclosure Act were housed. We walked in there, and there were these long reading tables, as they are in libraries, and every seat was taken. And he said, "My goodness" or something like that—I'm paraphrasing, he didn't say, "My goodness"—"Look at all those participants learning their rights." [Laughter]

And I said, "Please, let's go find out who they are." It turned out of course that they were all—substantially all, there might have been a few exceptions—mainly they were all insurance company representatives making mailing lists so that they could sell their products to these companies. They weren't taking down the names and addresses of participants; they were just taking down the names and addresses of all these companies, and building mailing lists. One of the things that caused ERISA to replace the Welfare and Pension Plans Disclosure Act is that you can disclose to your heart's content, but it isn't going to change things.

Norman Stein: I want to close off this debate for a moment, it's fascinating and I said I was hoping there would be fireworks at the conference, but maybe not this much. But I do want to give Ellen and Mary and David the opportunity to have the last word, particularly on this issue if that's what they'd like to talk about, funding inadequacy. So why don't we start with Ellen and then go to Mary and then David.

Ellen Schultz: Karin Feldman made a good point, which is when you look in the media, very often naturally you're going to see the stories of things going wrong. But the other thing you need to think about is what [are] the financial interests of the source of the infor-

13. *Pensions: The Broken Promise* (NBC News television broadcast Sept. 12, 1972), <http://archives.nbclearn.com/portal/site/k-12/flatview?cuecard=57200> (last visited May 29, 2014).

mation. I found in my reporting that the media and the public very often don't realize that there are two sides to a story, and that is true of pension funding practices. Most people realize there are two sides to stories, but when it comes to things like benefits, people don't know there's a "she" in the "he said/she said."

I find this very common in the media, where people will receive reports or studies or surveys by employer-funded groups, supposedly nonpartisan groups sometimes, also by consulting firms which just had nothing better to do than to do a very expensive study or survey to give to the media. And very often the conclusions are in line with the financial interests of the organization or the employers to wit: "Don't require us to fund our plans because that's bad for plans," or "Let us put as much money as we want into the plans because that's good for plans," and you both know the reasons pro and con for that. Or "Don't require us to follow discrimination rules because that is bad for plans." Or "Forget 415 limits, forget vesting rules because anything you do to constrain the plan will actually make the employers less eager to have a plan and they'll stop having plans and that's bad for the whole world."

When you bring it back to this funding issue, it's true that in the short term you're seeing various interests reporting on the funding health of a lot of plans, and the public doesn't understand any of it. They don't understand expected returns, they don't understand long time horizons, or risk, or anything like that. So it's difficult to try and present something balanced; but it helps if you at least consider the report in context, like if this is a basket case plan, let's look at the terrible things they've done with their funding and their strange actuarial assumptions, but then let's put it in the context of all the other plans. Where does it fit? Is the whole universe a mess or is this the worst part of the universe?

Mary Williams Walsh: I don't like to see cities go bankrupt. I feel very sorry for anybody who lives in a city that goes into bankruptcy or even gets anywhere close to bankruptcy. I feel like in some places, not all places, but if the pension plan is a mature plan and the population is shrinking and we have poor disclosure of what's going on—by the way, to interrupt myself, the thing that David was talking about, some of the disclosure of stuff can't even really happen in a way that I know because things are in collective bargaining agreements. They are promises; it's a contract that the city's going to do such-and-such, but it's not in the City's annual reports so you can't even find it out even if you're trying, you can't.

So anyway, you often have back-loaded funding. I don't know why it's like that, but it's like that. You have aging populations, you have people moving away from the cities, and I don't like to see that happen but it is sort of happening—it almost seems like it's automatic at this point, sort of a death spiral.

The situation in Detroit is the one that I'm watching the most carefully now because it is Chapter 9, and those proceedings will, I think, have to get to the bottom of it. The Michigan Constitution there does—Jeremy [Gold] is rolling his eyes—the Constitution does say that the accrued benefits cannot be impaired,¹⁴ so it seems to me as if they have a promise that's quite a bit like the ERISA one, where your plan can be frozen and you're protected with what you've already earned, but not what you earn in the future.

But we still have to sort that all out. We are going to have to travel through this whole long painful bankruptcy process and people are arguing about it ferociously, what it really means, and I feel sorry for people in Detroit who don't have any promise like that themselves, or who don't have a 401(k) plan. Their property taxes have gone up so they're paying much higher rates than in the suburbs around Detroit for worse services, and the situation is just terrible, and it seems to me that if I write about that then maybe things will coalesce and that won't happen in the future. But you're making me think, no, that will happen again because nobody can touch this issue. That's the perspective that I see it from.

Ellen Schultz: What's frightening, as David points out, is that this is compensation; it's deferred compensation, so you are taking the people who earn the compensation and blaming them for the actions of—whether it's the employers, or the legislators if it's a public plan. You're really going after the wrong target, but it's so easy to go after them because you can just play on all the biases of the general public: “Oh, they don't like public employees, they had to stand in line at the DMV once, it was a bad experience; nobody likes to pay taxes.” Again, you're sort of gathering everybody's attention to the wrong target.

David Cay Johnston: In line on a point both of you made, the Michigan Constitution's next provision after the one about not di-

14. MICH. CONST. art. IX, § 24 (“The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby.”).

minishing accrued pension rights, requires annual full funding of pension plans. If you didn't do the full funding, does that then eviscerate the previous provision? I think that's where the legal decision will turn. Part of the problem we have is that we don't have, I think, a proper definition here of fiduciary duty. Everybody in the world wants to escape fiduciary duty. I've been married to a fiduciary for more than thirty years, so I asked my wife when I was writing my last book, *The Fine Print*,¹⁵ "How has this affected our lives? How has it affected you?" And she said, "There's no problem with being a fiduciary unless every now and then, when it's convenient, you want to cheat people." I think that's the cultural norm we should be working towards—being a fiduciary is not a problem if you don't plan to cheat people.

Secondly, there is a real problem with the public understanding of pensions, because they think of them not only as gratuities but also as welfare plans. Malcolm Gladwell did an enormous long piece in *The New Yorker* about dependency ratios.¹⁶ Newspapers have written repeatedly about them. I'm sorry, a company can start out with one worker, grow to a million workers, go out of business, and go back to zero workers, and everybody will collect their pensions in full if it's properly funded.

I do not work—when I was at *The New York Times*—to pay the pensions of the junior reporters who now are there and replaced me. Money was supposed to be put aside for me, for my pension. These are not welfare programs, and that the public does not get; and it is crucial in discussing this that we get away from these terms that I mentioned in the beginning: contribution, benefit. It's compensation.

Finally, in the case of the Detroit bankruptcy and some of the others, if the bond buyers in Detroit failed to do their due diligence and failed to properly price the risk of the bonds they bought, gee, that's too bad. That's why we have risk. They're the ones who should take the haircut. The idea that we're going to have older Americans who have no possible way of going back and making up for the lost revenue, and who will become in many cases wards of the state—remember Lord Keynes said, "There is no way a society can escape the costs of old age."

15. JOHNSTON, FINE PRINT, *supra* note 5.

16. Malcolm Gladwell, *The Risk Pool: What's Behind Ireland's Economic Miracle – and G.M.'s Financial Crisis?*, THE NEW YORKER (Aug. 28, 2006), http://www.newyorker.com/archive/2006/08/28/060828fa_fact.

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So we have to figure out how we're going to finance it. To say to these people who mostly have no idea how a pension plan works and went to work and were told, "If you do this, you get the following" —and by the way, the average pension in Detroit is \$19,000 a year; in Ann Arbor it's more than twice that—to say to them, "You're going to take the haircut and not the investors who failed to do their due diligence." I have a word to describe that —immoral.

Norman Stein: Okay, well, that is from my perspective a perfect note to end this discussion. I want to thank the panel and Russ [Mueller], Jeremy [Gold], and Karin [Feldman] for a terrific discussion. [Laughter]