Expert Available for Comment:

THOMAS G. MOUKAWSHER

Author and Former Connecticut Superior Court Judge

Author of:

***The Common Flaw*: Needless Complexity in the Courts and 50 Ways to Reduce It** (Brandeis University Press, September 25, 2023)

THOMAS G. MOUKAWSHER has spent nearly 40 years studying, making, and administering law. He has been a lawyer, a legislator, a lobbyist, and for nearly 10 years a complex litigation judge, until he retired in 2023. As a former lawyer and judge he has tried hundreds of cases and argued dozens of appeals during his practice, including criminal, civil, family, housing, and complex constitutional cases. He is a sustaining life fellow of the American Bar Foundation and a member of the Madison Council at the Library of Congress. He earned a J.D. from the University of Connecticut School of Law where he was an editor of the *Connecticut Law Review* and a B.A. in English from *The Citadel* where he edited *The Citadel Review*.

Moukawsher served in local government and served a term as a member of the Connecticut General Assembly. Outside the judiciary he counseled Connecticut's governor, the president of the Connecticut Senate, and the chairman of the Democratic Caucus of the U.S. House of Representatives. He was counsel to the Connecticut Democratic Party. Inside the judiciary, for 20 years, he was one of the country's leading litigators in pension fraud cases in federal court. He co-chaired the American Bar Association Committee on Employee Benefits and was a co- author and editor of its book, *Employee Benefits Law.* During his practice he appeared before all levels of state courts along with courts in thirteen federal districts. He appeared before seven circuit courts of appeals across the country from California to New York along with the United States Supreme Court where he was co-counsel in a 2011 landmark ruling on fiduciary duties.

Moukawsher's opinions have repeatedly received national attention, particularly those on education, opioids, and the separation of powers. Observers have praised his direct and colorful writing style, and the*New York Times* even borrowed words from one of his opinions for its *Quotation of the Day*. His court rulings have been quoted in outlets such as the *Atlanta Journal-Constitution*, the *Boston Globe*, the *Chicago Tribune*, the *Connecticut Law Tribune*, the *New York Times*, the *New Yorker*, and the *Wall Street Journal*, and

and he has been published in *ABA Journal*, *Bloomberg Law*, *CNN*, *The Hill*, *Law360*, *Newsweek*, *Salon*, *USA Today*, and more.

In Moukawsher's book ***The Common Flaw: Needless Complexity in the Courts and 50 Ways to Reduce It***, he makes the compelling argument that we should simplify lawsuits to create a more human-centered and accessible legal system. Americans are losing faith in their courts. After long delays, judges often get rid of cases for technical reasons, or force litigants to settle rather than issue a decision. When they do decide cases, we often can't understand why they issued the judgment they did. In words that everyone can understand, Moukawsher proposes 50 changes—from the filing of a complaint in court to the drafting of appellate decisions—to replace the legal system's formalism with a new kind of humanism.

THEMES AND IDEAS THAT THOMAS MOUKAWSHER CAN DISCUSS:

- Why lawsuits last longer but almost never go to trial
- A better way to resolve legal disputes promptly and candidly
- Why courts can't be replaced by artificial intelligence
- How cartoons and movies such as *A Few Good Men* and *Dead Poets Society* can help us fix the legal system
- Why the U.S. Supreme Court approval rating is at a historical low
- Why it shouldn't be so hard to get a case heard and to understand what a court means
- How to reinvent the American lawsuit and focus on solving the problems of ordinary citizens and businesses
- Why courts should place humanism above scholasticism and formalism in decision making
- How the pretense of objectivity is hurting the courts—their denial of their humanity and their fallibility
- Why judges should guard against a herd mentality

A CONVERSATION WITH THOMAS MOUKAWSHER ABOUT *THE COMMON FLAW*:

Q: Why is your book,* The Common Flaw, *important in our current climate? What inspired you to write it?

A: I want to help slow the decline in faith in our institutions. Courts worrying over 18th century thinking or the form of a lawsuit rather than its substance forget that courts are supposed to be about resolving human conflicts in today's life and business. I wrote this book to pass on 50 specific ways I learned about how to do that after 40 years studying government, and particularly, the courts.

Q: Your book pushes for people-centered courts. How will courts shedding their formalist habits help reinvent the legal system?

A: Conservative formalism largely ignores people and their problems. Liberal formalism disposes of their claims without ever justifying the result. Both of them are concerned with the internals of a lawsuit instead of its externals. Conservative formalists focus on the history of the law to the exclusion of its contemporary impact. Liberal formalists stuff their decisions with background, case history, procedural

and jurisdictional machinations, the non-binding rulings of other courts and then—machine-like—spit out a largely unexplained result. Both groups yield long-lasting, wholly unsatisfying lawsuits.

Humanist lawyers and judges would do better. They would take a real human problem, apply to it values incorporated in law, and explain in plain language to the people in the case and to the public at large why the case merits a given result.

Q: How has the triumph of formalism in American decision writing coincided with an historic decline in respect for the courts?

A: You can't respect what you don't understand. We would be right to think that "originalist" judges are pulling the wool over our eyes when they say they have no choice but to look to the past to determine our present. We would be right to think that formalist judges, regardless of philosophy, often sound like they are talking to us with a mouth full of food. Many go on and on about nothing before getting to the point, and, when they do get to the point, we are too exhausted to respect their all too brief explanations of what decided the case.

What we do know is courts are slow, lawsuits are absurdly expensive, and we don't know why lawyers and courts do what they do—so we fill in the gap. We assume they are either knaves or fools—neither of which is true.

Q: You note that it shouldn't be so difficult to get a case heard. What are some steps to simplify this process?

A: Lawsuits very quickly and usually needlessly become all about themselves. Is the lawsuit in the right court? Is it brought by the right person? Was it brought too soon or too late? Should the claim be sent for an initial decision to some administrative agency? Was the claim written plausibly or should it be rewritten? Often for years, everything in a lawsuit is discussed but the claim itself.

I propose that preliminary matters be handled swiftly, at one court hearing, not 10. In months, not years. I propose that cases address as early as possible the claim made by the person bringing it, even if its only to say that the claim is meritless and that judgment should enter for the defense.

Q: Why do you feel it's important for judges to be addressed as "Your Honor"?

A: Courts should be honored, and we should demand that they be honorable. Honor isn't a word much in fashion these days but rightly viewed it represents more than just status—it reflects an expectation. When we show respect for others we remind them that they hold a position of trust in our minds. We want judges to be honest and thoughtful. We want them to be dutiful. Court rituals and forms of address for lawyers, judges, juries and parties reinforce feelings of respect for the institution. I believe they also remind the hearer that we expect them to deserve that respect.

Q: As a proponent for reducing complexity within courts and the judicial process, how do you view the use of artificial inteligence (AI) within these practices?

A: Artificial intelligence will grow into an invaluable research tool, and it will make traditional googling look glacial. AI will likely also be a great place to pick up ideas and test our own ideas. It must not replace human imagination and human judgment. Both are reflections of the inscrutable and lustrous humanity that make life worth living and which are the sole legitimate authority from whence consequences should be allowed to flow to our fellow humans.

Q: What is the significance of* Chevron *deference? If overturned, what are the potential ramifications for administrative law and democracy?

A: Courts should defer to the reasonable judgment calls of administrative agencies employing their expertise while regulating. The EPA's judgment about how much pollution is unreasonable should be deferred to. The trouble with *Chevron* deference is that this reasonable concept has been stretched into requiring courts to defer to agencies views of what the law says. When a Democratic administration takes power, agencies see the law as increasing regulation. When a Republican administration takes power, the agencies see the law as limiting regulation. If the doctrine is overturned, the law will be what judges say it is. One rule. One ruling. The Supreme Court should abandon the doctrine. But because so many cases relied on the doctrine, if the Supreme Court overturns it should do so prospectively only so as not upset settled expectations based on earlier rulings.

Q: You note in a USA Today article that "more than the presidential election will be at stake when the Supreme Court settles whether former President Trump is disqualified from office for engaging in insurrection." Can you elaborate?

A: The rule of law is a faith-based institution. To be credible, judges should be consistent. The present Supreme Court majority asserts that it looks at the text of the law and ignores the political implications of its rulings, a claim strongly asserted in the recent *Dobbs* abortion ruling. Consistent with this claim, the Court should simply read the constitutional provision disqualifying insurrectionists from office and do what it says. If the court tortures the words or ignores them in favor of a cherry-picked view of the provisions history, the court will confirm the view of those who increasingly see it as a partisan tool.

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