The Honorable Professor – Joseph Grodin

I suppose the reason I've been asked to talk briefly today is that my professional life in the Bay Area has crossed paths with Joe Grodin's at several junctures – as a labor lawyer, as a judge, and, perhaps most importantly for today's gathering, as co-teacher with Joe of a seminar here at Hastings – although the class is really Joe's, as far as I – and I think the students – are concerned. I'd like to look a bit at each of these lives of Joe – as labor lawyer, judge, and professor – adding what I can from our intersections over the years to the film we are about to see and the public record.

Joe and I were both lawyers representing unions for a large part of our careers, although at different times. Joe was never *just* a labor lawyer – being Joe, he delighted both in the real life adventures of his clients and their members, and in the theoretical legal issues raised by their questions and cases. And even after he became a full time professor, then a justice, and then a professor again, Joe's legacy as a labor lawyer lived on. While practicing, he wrote many articles on what must have seemed at the time relatively obscure labor law – and other -- issues, some with his mentor Matt Tobriner. Those articles uncannily anticipated later developments in the field; reading one article last night, I noticed that Joe had identified over fifty years ago an unresolved issue recently decided in the Seventh

Circuit and currently pending in a case in Idaho.

As far as I know, Joe was the only practicing unionside labor lawyer who made time to write a substantial number of serious, deeply grounded articles – not advocacy pieces at all, but reflective ones. Perhaps the pinnacle of Joe's penchant for translating from the minutia of everyday legal practice to the world of legal scholarship and future development of the law was a California Law Review article – without Joe, it appears, the California Law Review would have folded in the fifteen-year period he was in practice – written with Justice Matthew Tobriner and entitled The Individual and the Public Service Enterprise in the New Industrial State. Not exactly the stuff of a just cause discharge labor arbitration, one would think, or an appellate National Labor Relations Act case – the daily grist of most labor lawyers – yet heavily influenced by his experience in dealing with the internal affairs of labor unions, early characterized by courts as what the article calls public service enterprises. And, interestingly, one sees in the Public Enterprise article the seeds of some of Joe's later interests, and strengths, as a judge and a professor – principally, an appreciation of the common law and its methodology, the astute perception of large social changes likely to influence legal developments, and the ability of a nimble mind to see parallels and cross-fertilization in such diverse fields as the law of landlord-tenant relationships, the

law of internal union affairs, and bad faith insurance litigation. As we shall see, Joe carried those same attributes, and even the same analogies, into his work while on the bench, as well as afterwards.

First, though, I should mention one other typically Joe contribution to the local practice of labor law. Labor law practice is famously contentious, split between union and employee attorneys, on the one hand, and management lawyers on the other. The tone of the practice tends to be no-holds-barred, in court as well as outside of it. But Joe is by nature both garrulous and committed to reasoned discourse and open discussion; he is also a dedicated outdoors person. So my understanding is that he set out, with his former partner Duane Beeson and two or three management attorneys, to establish a conference in a spectacular location, the Ahwahnee Hotel at Yosemite, where peace would be declared for two days, we would all attend panel discussions for a while, and then we would all go out hiking or skiing with our spouses and children, with the good feeling (and good information) hopefully carrying over to the rest of the year's practice, softening some of the rough edges. Joe has remained the most popular speaker at these events when he is able to attend, with the crowd hanging on his wonderful stories about past labor management squabbles as well as his trenchant analyses of current labor and employment law trends – for another Joe characteristic is the

ability to integrate all of his past experience and wisdom with contemporary social and legal developments, yielding a mix that no one else I know of is able to emulate.

Moving forward in time, Joe and I were both judges, again at different times. Joe was an extraordinary justice for the relatively brief time he was permitted to serve. I am confident he would have become part of the small pantheon of non- U.S. Supreme Court justices (Learned Hand, Henry Friendly, John Minor Wisdom, Frank Johnson, Roger Traynor) widely revered for their impact on American jurisprudence, had his career not been cut short. That it was is to many of us a tragedy, but not to him – more bemused by the turn of events than angry, he went off to write a book reflecting on his experience as a justice and on the judicial election process that, to his great surprise, ousted him, and then went back to Hastings and picked up his scholarly and teaching career, adding to the mix new interests developed during his years on the courts as well as stints as an arbitrator and as a hearing office for internal union inquiries.

Of the opinions he wrote while on the Court of Appeals and the Supreme Court, I wanted to talk a bit about Pugh v. See's Candy, not so much because it may have been his single most significant contribution as a practical matter, but because it well illustrates the continuity between Joe's long term interests and

habits of inquiry and his judicial approach. Pugh opened up the world of implied employment contracts guaranteeing some security of employment, based on a range of factors, including longevity, oral representations made when hired or while employed, written employment policies, and so on. Joe joked once that when he wrote the opinion, he did not predict that whole law firms would spring up to litigate wrongful termination cases, but in fact they have.

What is interesting to me is that in first devising and then drafting Pugh, as well as a companion case, Joe went back to his intellectual and professional roots, to the common-law but eclectic mode of analysis in the Public Enterprise law review article, as well as to his immersion in the legal world of workplaces. First, he noted how the world had moved on in recent years, placing limits of various kinds on the employer prerogative to fire employees for any reason or no reason; second, as he explained several times in discussing the Pugh opinion, he recognized that common law developments in other areas – in particular, in the common law cases that created a legal network for the internal governance of labor unions, the subject of Joe's PhD. thesis – had modified imbalances of power through judge-made adjustments of contract and other doctrines; and third, in his writings on the subject, he explained that he also drew on his comparative law experience – his thesis had compared British and

American union law – to note that this country was far beyond most of Europe with regard to security of employment for individual employees.

Joe often talked in his academic writing of his admiration for Holmes' and Cardozo's analyses of the common law process. The loss of Joe's now-unusual ability to carry forward into his judicial work that traditional process of careful yet creative jurisprudence seems to me to be the saddest part of what was lost when the electorate – as he has said, without much clue as to what it should be doing in a retention election for the California Supreme Court – turned him out.

The final major thread of Joe's professional life – I am leaving out his brief stint on the Agricultural Labor Relations Board, well covered in the film – has been his long academic career, almost all of it here at Hastings. For the last five years, I have crossed Market Street one afternoon a week each Spring to teach with Joe a class now called Judging the Constitution. Although I am listed as a co-teacher, I most often feel that I am a co-student, enthralled by Joe's musings and analyses about the process of judging – including the niceties of constitutional doctrines such as First Amendment "balancing" and the usefulness of the various standards of scrutiny; the importance of state constitutional independence (a favorite topic, both in class and in Joe's post-judicial writing); and the vital importance of understanding judging from a middle ground, as neither calling

balls and strikes (I was amazed discover that Joe used that analogy, quizzically, in his 1980s book, In Pursuit of Justice, long before Justice Roberts invoked it in his confirmation hearings) or reflecting the judge's own policy predilections, or what he or she ate for breakfast. On the last point, Joe has been consistently insistent; just last year, he repeated it, in a response to Professor Brian Leiter published in the Hastings Law Journal:

Most judges . . . would say that constitutional adjudication lies somewhere in the middle of a continuum between judge-as-referee and judge as legislator, and that judges believe (and we want them to believe) that while moral and political values undoubtedly play a role in constitutional decisionmaking, judges are constrained . . . by a variety of factors, including constitutional text and history, past decisions, their legal training, the opinoins of their peers, concern for the integrity of the Court as an institution, concern for the maintenance of a rule of law, and concern for their own place in history. . . . [We] need to find a way of talking about a middle ground that does justice to the complex judicial task

At Professor Grodin's suggestion, we usually begin our seminar each spring with Lon Fuller's The Case of the Speluncean Explorers, a fanciful story – based on real life incidents – about five individuals trapped in a cave who resort to cannibalism. The piece is amusing, yet serious – its point is to consider

contrasting approaches to the tasks of judging. Each year, we debate with the students whether strict constructionism (the fictional Justice Keen), creative purpose-based analysis (Justice Foster), abdication of the judicial role when the outcome dictated by legal principles is not acceptable (Justice Tatting), result-orientation resting on public opinion (Justice Handy) or purported reliance on separation of powers (Chief Justice Truepenny) is the more appropriate approach to judging the make believe legal dilemma. We have fun with the discussion, but we also hope to set up the parameters of the discussion for the rest of the term, as the class is asked to discuss the judicial challenges lurking in particular pending cases in the U.S. and California Supreme Courts (and occasionally other appellate courts). Listening to Joe interlace philosophical discussion with a bevy of wonderful stories – Joe is the consummate story teller, always coming up with pertinent tales – is to watch a master at his game. Incidentally, Joe never lets on which of Fuller's apocryphal justices' approaches he most sympathizes with, although I suspect it is a toned-down version of Justice Foster's attempt to find some basis in established legal principles for reaching what appears to be the most just result.

One other comment on Joe's teaching: Joe had to miss one class last year because he was seriously (although temporarily) ill. He told me that as far as he

could remember, that was the first class he had missed in decades teaching.

In the classroom, as behind the lawyer's podium and on the bench, Joe Grodin has transformed, and continues to transform, the various legal worlds he has encountered, bringing to every task his bounding energy, felicity of language, depth of thought, good humor, and profound commitment to shaping a better society. He has never accepted received wisdom; as in his wilderness hiking and rafting endeavors, he has been willing to take risks and to confront the unknown. But also as in his outdoor activities (I suspect – regrettably, I have never hiked with him) he is always well prepared, using all the available tools, and staying within acceptable bounds.

Both a craftsman and a visionary, Joe Grodin has for so very many years graced this institution and this city, and continues to do so. We are all the better for it.