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A Court and a Judiciary That Is as Good as Its Promise

Kevin S. Burke

Editor's Note: These remarks, edited for publication, were given by Judge Kevin S. Burke on November 20, 2003 in the Great Hall of the Supreme Court, in ceremonies during which he received the 2003 William H. Rehnquist Award for Judicial Excellence.

The father of modern judicial administration, Professor Roscoe Pound, identified timeless tensions we face, including widespread misunderstanding of, and dissatisfaction with, the courts as well as with the other branches of government. A generation ago, Pound gave a famous speech entitled “The Causes of Popular Dissatisfaction with the Administration of Justice.” Pound spoke of many things that contributed to the dissatisfaction he perceived during his time. While there have been enormous improvements in the structure of the administration of justice, a generation later we have not met the fundamental challenge of reducing the causes of popular dissatisfaction with justice.

Today the dissatisfaction with the administration of justice is at a level that none of us should tolerate or accept, for it threatens our democracy as much or more than any terrorist. The nation's dissatisfaction with the administration of justice is our issue of homeland security. In Pound's speech, he spoke first of the popular assumption that the administration of justice is an easy task to which anyone is competent. The fact that I am the recipient of the Rehnquist Award proves to many that Pound was correct.

Pound said a second factor that contributed to the dissatisfaction was the political jealousy that the other branches of government have with the judiciary due to the doctrine that courts have the final say in what the constitutional law is in our nation. Today it is fair to say that too many of our colleagues in the executive and legislative branches have many of the jealousies of their predecessors. Unfortunately, some political leaders are

too easily prone to speak of judicial tyranny when there is mere disagreement with the outcome of a case.

Pound identified a third cause of dissatisfaction that he described as the sporting theory of justice. The sporting theory of justice is the view that essentially the legal process is two modern gladiators in a pitted war, with the role of the judge to be simply a referee for the combat. Even today the sporting theory of justice is so rooted in the legal profession in America that many of us take it for a fundamental legal tenet. Pound argued that the sporting theory of justice disfigures our judicial administration at every point. It leads the most conscientious judge to feel that he or she is merely to decide the contest, as attorneys present it, according to the rules of the game, and not to search independently for truth and justice. It leads attorneys to forget that they are officers of the court and to deal with the rules of law and procedure exactly as the professional football coach deals with the rules of the sport.

All of us—in the courts and the community at large—pay the price for misunderstandings about the courts. While I believe that there is far more trust and satisfaction with the court system than many of our critics would lead you to believe, it's easy to feel a bit under siege at times. We need to maintain perspective. Our nation has always been critical of the judiciary. Chief Justice Marshall, who today is revered, was nearly impeached in an effort fostered by Thomas Jefferson. Marshall, not having the benefit of a court public information officer, was forced to respond to critics by writing a series of letters to the editor in his own defense, using a pseudonym. Nearly a century later, President Theodore Roosevelt, upset with a ruling from the Supreme Court, said of Justice Oliver Wendell Holmes that he could carve out of a banana a judge with more backbone than the backbone of Oliver Wendell

Holmes. Billboards populated the nation demanding the impeachment of Chief Justice Earl Warren. Former President Ford at one time wanted to impeach Justice William Douglas. Despite—and perhaps because of—criticism, the judiciary continues to thrive, change, and, I am hopeful, improve.

A factor that contributes to our generation's cause of popular dissatisfaction with the administration of justice is the way we conduct public debate on the issues of our time. Regrettably, too often the current method of policy disagreement is to take the other guy's idea, mischaracterize it, and announce your profound disagreement and outrage. Moreover, not only is our political rhetoric divisive, our nation is divided as well, which also contributes to the difficulty we have in responding effectively to the popular dissatisfaction with the administration of justice. The social historian Gertrude Himelfeld described us as “one nation, two cultures,” one more religious, traditional, and patriotic, the other more secular, tolerant, and multicultural. It should be no surprise that a polarized nation is also conflicted when it comes to a vision for what the justice system should look like.

Learned Hand articulated a vision of justice and liberty that—despite our healthy and legitimate differences about how justice should be delivered—calls to mind some of our highest aspirations. On May 21, 1944, when the world faced many of the same kinds of challenges we face today, he asked:

What, then, is the spirit of liberty? I cannot define it; I can only tell you my own faith:

- The spirit of liberty is the spirit that is not too sure that it is right;
- The spirit of liberty is the spirit which seeks to understand the minds of other men and women;
- The spirit of liberty is the spirit

which weighs their interests alongside its own without bias.

When you think about what Hand said, he called on the best of our humanity when judges put on the robe—as much as he called on our judicial independence, our impartiality, and our ability to apply the law to the facts. Hand tried to tap the powers we *bring to the bench*, not just those that are *attributed to us on the bench*. If judges and lawyers are “not too sure we’re right,” we can be far more creative.

We can move away from the sporting theory of justice. Instead, whether we are judges, lawyers, or administrators, we must move from recycling problems toward resolving them with the best thinking of the courts and communities. We need to connect the resources within our communities, whether the issues are in drug court, mental health court, family court, or in how we respond to the issue of race and diversity. The courts of the future require partnerships with the other helping professions and the public at large.

I am not so naïve as to expect universal agreement on the issues that face the courts. We will and should have our disagreements on the vision of justice we each seek. But we must do so in a manner that fosters public confidence. Unfortunately, the judiciary and the leaders of the bar are at times contributing to the popular dissatisfaction with the administration of justice. Too often we forget Hand’s admonition that the spirit of liberty is the spirit that is not too sure that it is right.

Morris Udall once said, “God give me the grace to make my words gentle and tender, for tomorrow I might eat them.” In an era when the nation is so divided and its political leaders and pundits have an unhealthy tendency toward “gotcha” rhetoric, those of us affiliated with the judicial branch must model the behavior and rhetoric we hope for from the other branches of government. There will be vigorous dissents from appellate courts and spirited debate by court administrators and court leaders. Today more than ever, we must model our behavior and our debate of the issues that face the courts so that the other branches learn from our example. In the relationship judges have with court administrators and employees, we must remember we

were appointed, perhaps elected, but never anointed. The words of Morris Udall will serve the legal profession well.

The popular dissatisfaction with the administration of justice is not fueled just by rhetoric, but by performance. For some understandable reasons, courts have differentiated themselves from the private sector and its business practices. We say that courts neither control the influx of cases nor the laws that create them, that due process is intrinsically inefficient, and that the administration of justice is complex and, therefore, not amenable to modern management practices. The unfortunate consequence of these and other such arguments is that most courts can articulate what does not work, but have not designed quality initiatives that do work in what is asserted to be the unique culture of the court. Our challenge is made more difficult with the fiscal crisis that confronts too many state courts. However, a lack of money is not an excuse for a lack of ideas. We must be willing to innovate if we are to effectively address the popular dissatisfaction with the administration of justice.

Barbara Jordan once said, "What the people want is simple. They want an America as good as its promise." The same can be said of what this nation wants of its courts. They want a court—they want a judiciary—as good as its promise.

A court or a judiciary that is as good as its promise is known not just for speed and efficiency (heaven knows, we're good at that), but also for other, less quantifiable aspects of justice—things like fairness and respect, attention to human equality, a focus on careful listening, and a demand that people leave our courts understanding our orders. Courts cannot be satisfied with being quick. Nor can we be satisfied with being clever. We must strive to be fully just to every person who leaves the courthouse.

Last year there were nearly 90 million cases filed in the state courts. In Minnesota alone we had nearly two million cases. The volume of work makes individual attention to justice seem at times to be an unattainable goal and so we rest on measuring our speed. It has been said that what you measure is what you care about. To address the popular dissatisfaction with the administration of justice, courts and judges must measure

and be accountable for the fairness of our actions.

Most importantly, we need to directly confront the notion that although judges at every level must be neutral, neutrality does not dictate that we mask that we care. Litigants and the community must know that the judges of our country care about them as individuals.

Several years ago, I sent a young African-American by the name of Isaac to prison. After his release, he was again convicted of a new drug offense. One afternoon I found Isaac outside my chambers. He was distraught and obviously angry. He told me that someone had taken a shot at his mother. If you knew Isaac's past, you would predict he'd seek revenge. Isaac's mother asked him to go see me. She said that she did not want to see him dead or in prison for the rest of his life. We talked and that day Isaac kept his mother's wish for him alive. Isaac did not seek revenge. Although I knew Isaac, I never met his mom. Somehow, however, she thought that the court was a place that cared.

A few months ago, a young African-American by the name of Adrian came to see me. He told me that he had been employed for two years, was drug free, and was living with his girlfriend. He wanted to get married, but his girlfriend said he had to resolve his anger issues with his mother first. Adrian had lived on the streets since he was 13. His mother was involved in prostitution and drugs. I had no answers for Adrian and told him so. He responded that he understood, but what he really wanted to talk about was not his relationship with his mother, but the fact that he had a younger brother who was 13. Adrian did not want him to grow up the same way he did. He thought he could find the answer in a conversation with a judge. Adrian believed the court was a place that cared.

On my desk I have a creature—an angel given to me by the mother of a boy named Christopher. Christopher was a little older than Isaac or Adrian. Christopher was white, middle class, and a heroin addict. Christopher's mom gave me a note and the creature to thank me for trying. Her son had stayed straight for four months, relapsed, and then died of an overdose. His mother thanked me for giving Christopher back to his family for those four months. Even though her

son died and we failed her family, Christopher's mom thought that the court was a place where people cared.

It's not trite to say that the courts play an indispensable role in preserving democracy. They most definitely do. Any particular case we hear may not have great historical effect, but each case is a crucial human event. Taken together, the decisions we make day in and day out have the potential to affirm the public's faith in the strength of democracy—or to shake that faith. What the people want is simple. They want a court—they want a judiciary—as good as its promise.



Kevin S. Burke is chief judge of the Hennepin County District Court in Minneapolis. Appointed to the municipal court bench in 1984, he became a general-jurisdiction trial judge by court merger in 1986.

He received the 2003 William H. Rehnquist Award for Judicial Excellence from the National Center for State Courts, having previously received the National Center's Distinguished Service Award in 2002. The Rehnquist Award is presented annually to a single trial judge who exemplifies the highest levels of judicial excellence, integrity, fairness, and professional ethics. Burke established the drug court in Minneapolis and has engaged in detailed studies of court fairness, including ones exploring what factors determine whether criminal defendants and victims believe a proceeding was fair. He is a 1975 graduate of the University of Minnesota School of Law, where he is an adjunct member of the faculty.