

## 2002 Judge Edward R. Finch Law Day Speech Awards Winner

1<sup>st</sup> Place

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### The Command of Equal Justice

Thanks very much. I am delighted to be here—to speak to this great gathering. To share the podium with the likes of Larry King—who has done so much through the Council for Children. And so many others here—who, every day, through their efforts—live out Vaclav Havel’s definition of hope. Which he described not as naïve belief that everything is going to work out well, or as a prediction of future success, but as a predilection of the spirit, a predilection of the heart. A conscious choice about the way to live your life. To believe that we can make a difference in the quality of our private and public lives. Embracing the nobler of hypotheses. I’m honored to be among you.

And I’m happy to have a topic—equal justice under law. I’ve been a dean for almost 12 years. When I became a dean, I was surprised there were so many ceremonial occasions at which I was supposed to speak—where the assignment is to say something warm and mindless—sure to touch the alumni’s bonds of affection and their pocketbooks—and, of course, never risk offense. Reminding all that their alma mater now runs in a state of sweet, ever-improving perfection. It surprised me even more, though, when faculty started telling me I was really good at giving warm and mindless remarks. I am, they said something of a natural at it. So this is notice that I’ll depart from my habits this morning. And what are my more advanced talents. And if I slip and start asking you for money, let me apologize in advance. Old habits die hard.

And I hope to turn to these topics with some seriousness and some candor. We’re on an academic calendar where I work. So the year is coming to an end. I was thinking about that as I was deciding what to talk about today. This has certainly been a year to force self-examination. From September 11, to the war in Afghanistan, to the murders in Grundy, Virginia, to the terrors of Israel and Palestine. Over and over again, we’ve been forced to stare hard at what we do, and ask whether this is the way we believe in spending our lives. Whether these are the contributions we mean to make.

And we face these questions in a world much changed. Changed, I think, more than we can say. We have had a look at real courage. We’ve seen that it doesn’t take place on a sports field or in the stock market or in a .com—but in the sound of heavy boots pounding up a staircase as a building tumbles down. In the face of a widowed mother speaking of, and to, her fallen husband. And the heroes look more like us than Arnold Swartzeneger. We’ve been reminded that you’re not best measured by a job or a school or a product or a salary, but by the demands of character and courage. We’ve had a powerful, unavoidable lesson in what matters.

We have seen, too, that our virtue as a nation is still in the making. Our course is not set. It’s not unalterable. We, too, have to do our part. Our contributions are on the line. And they’re contested. We don’t know yet what their nature will be. Many people my age and

younger have been forced to think, really think—sometimes for the first time—what it means to be an American. We've seen that despite years of scandals and political corruption, the dominance of greed, the retreat from the public sphere, the great mass of us have not given up on the notion of an American ideal.

We live in times of crisis. That's true. But our finest, most enduring efforts at self-definition have come in times of crisis. Jefferson defined a national mission at the outset of Revolutionary War. Lincoln, intentionally, pointedly, rededicated it at Gettysburg. Roosevelt offered a new vision of our relationship to government with the Four Freedoms speech during World War II. Dr. King charged us at the Lincoln Memorial, in the midst of struggles in Birmingham and Selma. Lyndon Johnson spoke the words "we shall overcome" to a joint session of congress in demanding the Voting Rights Act; but only after Fannie Lou Hamer sang them, bloodied, in the streets of Mississippi. In Colorado, where I used to live, lesbians and gay men found the power of their community only after passage of a spiteful anti-civil rights law.

Tony Kushner has written "there are moments in history when the fabric of everyday life unravels...allowing for incredible social change within a short time. Life can be transformed for good or bad. It can go either way." So we're in a physical fight-- in Afghanistan, maybe in Iraq, perhaps again here at home, and across the globe. But there's another fight too. A fight to decide what kind of country we will be during and after the war on terrorism. It is, I believe, a struggle as real and as vital as our physical efforts to protect ourselves. Because we can lose our national charge, commitment, our self-definition, by turning our backs on what we believe in. And that loss is as great and as tragic and as contrary to our history as any loss on the battlefield. So this fight is on the table as well. And it's like the Irishman said: "Is this a private fight or can anyone get in it?" And the answer for all of us has to be—"come on, get in".

In some ways, the fronts of this battle are obvious. Obvious because we understand that it betrays American constitutionalism when people are detained, without trial, merely on the enthusiasms of a fevered Attorney General. With a hundreds of immigrants held—often without hearings, sometimes without counsel, often without clear notice, under gag orders or secret proceedings. With restrictions on attorney-client privilege; with profiled questioning; with limitations on judicial review, with the nation's chief law enforcement officer calling his critics traitors and supporters of terrorists. Failing to understand, perhaps, that we don't defend constitutional liberty by abandoning it.

But I think it's vital to look more broadly at our commitments to American notions of liberty and equality—if we're to make full use of this period of forced self-examination. What has happened to our essential, constitutive commitment to equality—we could ask—when the greatest economic power in history allows 20% of its children to live in poverty. When almost all major industrial countries do far better. As if any theory of justice or virtue could explain the exclusion of innocent children from the American dream.

And why should it be that the most powerful nation in the world—with the greatest rhetorical commitment to equality—should allow 40 million of its members to exist without health care. With the number rising every day. While every other major industrial

nation provides something much closer universal coverage. Lincoln said that ‘the central idea of America’ is the notion that the weak would gradually be made stronger and eventually all will have an equal chance.’ Are we still committed to Lincoln’s ‘central ideal’, or have we taken his foundational aspiration off the table.

And we can go further. Can be equal opportunity when all over North Carolina and the rest of the nation—we have rich and poor public schools—not just private schools mind you—but rich and poor public schools. Because it is thought acceptable for government to treat some of our children as second and third and fourth class citizens.

And is there really equal justice when some of us are instructed, ‘don’t ask, don’t tell’; and here in North Carolina others acts of intimacy are literally made a crime? And is there really respect for equal human dignity in a system of capital punishment that is often about race, and often about mental incapacity, but ALWAYS about poverty?

And can there be a real democracy if citizens are forced to pay, in order to play. Like Barney Frank told me once, ‘we’re the only people in the world who insist that our elected officials go up to strangers, ask them for thousands or hundreds of thousands of dollars, get it, and are completely unaffected by it. Achieving a ‘state of perfect ingratitude.’ When, of course, we know it’s not so. And yet we seem satisfied to let our economic system swamp and dominate our political one.

But for our purposes, given the topic of this luncheon, there’s one departure from our foundational values which is even more stark than these. We carve ‘equal justice under law’ on our courthouse walls. It is the cornerstone of our system of adjudication. We swear fealty to it every day. For decades, we’ve announced as a fundamental principal of our constitution ‘that there can be no equal justice where the kind of trial a person gets depends on the amount of money he has.’ But what we actually do has little in common with what we say.

Think, for a second, about a set of facts that we all know, at least in the back of our minds, to be true. Lawyers cost money. Some have it. Lots don’t. Yet unlike many industrial nations, we recognize no general right to representation in civil cases. Less than 1 percent of our total expenditure for lawyers goes toward services for the poor. Legal aid budgets are capped at levels making effective representation of the poor a statistical impossibility. Even at that, they’ve been cut by large margins over the last decade.

We have one lawyer for every 380 people generally, and one legal services lawyer for every 4300 persons living in poverty.<sup>1</sup> We fence folks out even further by creating categories of unworthy poor; and placing restrictions on the most efficient avenues for representation. Study after study shows about 80% of the legal need of the poor is unmet. It is almost as bleak for middle-income Americans. New York’s state bar study a couple of years ago found that we leave the poor unrepresented on the most crushing problems of life—divorce, child custody, domestic violence, housing and benefits disputes. We think it natural that a commercial dispute between wealthy businessmen takes six months

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<sup>1</sup> The access to justice arguments rehearsed here rely strongly on the excellent work of Deborah Rhode. See, particularly, Rhode, ‘Access to Justice’, 69 Fordham Law Review 1785 (2001) and Deborah Rhode, IN THE INTERESTS OF JUSTICE (2001).

to try while the fate of a battered child is determined in a few minutes. What passes for civil justice among the have-nots is stunning.

On the criminal side, we often trivialize the right to counsel that we have declared. Public defenders can have crushing caseloads. Rates of compensation for appointed lawyers are often laughable. Thousand dollar caps in felony cases are common. Competitive bid schemes can make it worse—leading to “meet ‘em, greet em, and plead ‘em” defense regimes. Even in generous bars like Mecklenburg County, it can be impossible to get adequate listings for federal criminal appointments.

We’ve developed embarrassing rules of constitutional effectiveness—what Deborah Rhode calls a “jurisprudence of dozing”—ruling not only that inexperienced lawyers, but drunk lawyers, drugged lawyers, mentally ill lawyers and sleeping lawyers can pass muster. One court explained that “the constitution does not say a lawyer has to be awake”; another ruled that sleeping “might have been a strategic ploy to gain sympathy from the jury.” This must have provided only modest consolation to the client.

We embrace access and equality rhetorically without making serious attempts to give them practical content. “Equal justice under law” doesn’t approximate the way the system operates in practice. Ordinary citizens are priced out of the justice system. And they are barred from participating in the closed regulatory scheme that excludes them.

Whether we’re talking about the courts, the law schools or the bar, I don’t think this is the way we meant it to be. It is not what we wanted American justice to become. But whether we designed it, or just maintain it and accept it as given and unalterable—it is what we have. It is the field in which we all toil. Chief justices oversee it. Bar presidents praise and prod it. Law deans feed it. [Most days, I know, both groups are convinced that we’re powerless to change anything. But in truth we’re not. And we know we’re not.] The system we have is powerfully, dramatically, and fundamentally at odds with who we say we are.

We have, I fear, all played our parts. Bar committees, judicial commissions and law school conferences raise these issues—though less frequently than one would think. But even when raised, they don’t make their way forcefully into our constitutional law [state or federal], our legislative policy debates, our codes of ethics, or our law school curricula and research regimes.

In studying the literature—as best a law school dean can do—I read from one of the most accomplished and solid legal scholars I know—Deborah Rhode, “Access to Justice,” in the *Fordham Law Review*—“the best available research indicates that the American legal profession averages less than half an hour of work per week on pro bono services, and under half a dollar per day in support of legal services to the poor.” Most lawyers do no pro bono work at all. Recent affluence has eroded rather than expanded support for pro bono programs. Over the past decade, the average revenue of the country’s most successful firms increased by over 50%, and pro bono hours dropped by one-third. Nationally, service to the poor represents less than one percent of lawyers’ working

hours. I can report from personal experience that bar associations have fought mandatory pro bono requirements with a zeal and passion unsurpassed. Sometimes we operate exactly like a self-regulated monopoly would be expected to.

Courts have, with very narrow exceptions, refused to constitutionalize rights of representation in civil cases. They've degraded them in criminal ones. Nor have judges moved in overarching ways to simplify legal processes to make representation less necessary. Mostly, these are sins of omission. Though they sometimes move beyond that—as when some state courts have stepped in, shockingly, to restrict legal clinics even at private law schools. Clinics providing free and effective representation for poor organizations unable to obtain legal help elsewhere. As if a favorable business climate requires that the poor be prevented from asserting even the clearly established legal rights they have.

Few law schools have mandatory pro bono programs, including my own. [Though my assistant dean would kill me if I didn't mentioned that we have a vibrant, nationally-recognized voluntary one.] Issues of access to justice are either missing or marginalized in our curricula. Relatively little of our research focuses on what passes for justice among the have-nots. The written work of our faculties rarely involves arenas where people are most afflicted. Our curriculum takes the present deployment of legal resources as a given. Who uses the system is unexplored. Law firms are not topics of study or critique. The greatest shortcoming of law schools may be the failure to explore and articulate a theory and practice of the just deployment of legal resources.

These large questions go unasked and unanswered—when surely we are in a unique position, and have a unique obligation, to see that issues of access to justice occupy a central place in our study and debate. In the meantime, we add to the problem with tuition increases that outstrip inflation and, for many, the ability to pay. Our students' aspirations become swamped by their debts. We seem caught in our own cycles of status and competition--adding to the costs of legal services and to the fencing out of the underserved.

So it's my hope that our future efforts will point in these directions. The flight from equality is as great a barrier to the administration of justice in our communities as many other issues which have been the focus of the legal community's major concern in the past decade—issues like civility, professionalism, discovery abuse, and the like. Actually, the denial of access to justice is a greater barrier than any of these. Far greater. Even if it has received fewer of our attentions.

It is also, of course, an even more difficult problem to solve. But that's not a reason to turn away. If the problem is great enough, the violation of our constitutive ideals strong enough, the threat to our democratic standards real enough, the gap between our words and our deeds massive enough, then surely we decide to go at it full bore. We experiment, we try, we fail, we regroup, we try again. We try again because we know that what we are, what we believe in is at stake.

And that's why your efforts here—and most importantly—your work in the broader community is so vital, and so heartening. When you work with the Mecklenburg County

Bar's Volunteer Lawyers Program, or when you help out the marvelous Legal Services of the Southern Piedmont, or you raise money for them, or you participate in the Hispanic Outreach Project, or the Children's Law Center, or work with Legal Services for the Elderly, or you follow the lead of firms like Robinson Bradshaw & Hinson or Kilpatrick-Stockton or Moore & Van Allen in making tremendous commitments to pro bono service. Or you work like Sherry Murdock—logging over 1200 hours of pro bono service in the last decade. Or Woody Connette and Louis Lasane's volunteer institutional litigation. Or when you step out—as hundreds of Charlotte lawyers have, to help lead the way in the private bar. You touch the core of the highest aspirations of this profession. And you help to put center stage the aspirations that the legal community at large so frequently ignores. And you remind us, by example, that we have so much more that we are charged to do.

In the crucible of this time, in this period of self-examination--it is vital to become fully engaged –as lawyers, as citizens, as activists. Citizens who believe that our virtue as a people is still in the making. That we are charged, literally, to make the promises of democracy real. That, as Dr. King so often said, “the arc of the moral universe is long, but it bends toward justice.” And that it is up to us to do the bending. And that ultimately these aren't matters of right and left, they're matters of right and wrong.

A couple of months ago, I read Ralph Ellison's posthumously published novel *Juneteenth*. There, Ellison's main character says this:

“We are a nation born in blood, fire and sacrifice. Thus we are judged, questioned, weighed—by the ideals and events which marked [our] founding. These transcendent ideals interrogate us, judge us, pursue us, in ... what we do, or do not do. They accuse us ceaselessly, and their interrogation is ruthless, scathing...until, reminded of who we are, and what we are about, and the cost[s] we have assumed], we pull ourselves together. We lift our eyes to the hills and we arise.”

Our constitutive call to equal justice surely interrogates and accuses us. It judges us and finds us lacking. The answers we offer and the excuses we provide do not satisfy. Not if we are what we claim to be. When Bob MacCrate kicked off a great national legal conclave a decade ago, he said: “I sense at times a studied effort on the part of legal educators to avoid responsibility for ... the grievous shortcomings” of the legal system. “I suggest that law schools cannot add 30,000 new lawyers to the Bar each year and avoid responsibility for the kind of profession its graduates create.” I think MacCrate was right. And what's true for the law schools is true for the courts and true for the bar. We can't escape responsibility for the system of justice we create.

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