

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

2<sup>nd</sup> Place

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### Assuring Equal Justice for All

The theme of Law Day is once more the salutary objective of “Assuring Equal Justice For All” The concept of ‘justice’ is an ancient and venerable one. We’re told in the Bible that Micah said; “He has told you, O mortal, what is good; and what does the Lord require of you but to do justice.” We’re told in Deuteronomy “justice, and only justice, you shall pursue.” I’m sure you know the among the first seven laws of all time – the ones given to Noah – was a directive to establish “courts of justice.”

In preparing for today’s remarks, I began to wonder exactly what the Bible meant by “justice.” Is justice an immutable principle that has clearly-recognized and definable content, or is justice like pornography – you know when you see it – so that it would have different meaning depending who is doing the seeing?

As I prepared for my remarks today, I also began to wonder whether justice can be measured in terms of being too much or too little. Micah’s injunction would suggest there could never be too much. I’m not so sure.

In pondering these questions, I was inevitable draw to call upon my instincts as a lawyer. On the one hand, my instinct is that “justice” can be defined in legal terms. On the other hand, my training as a lawyer prompted me to question that conclusion, and conduct some research. I found that the author, Raymond Chandler, said

The law isn’t justice. It’s a very imperfect mechanism. If you press exactly the right buttons and are also lucky, justice may show upon in the answer. A mechanism is all the law was ever intended to be.

Supreme Court Justice Potter Stewart once said that “fairness is what justice really is.”

My “take” on these questions is that justice is not readily identifiable, and the Bible notwithstanding that it’s not an inherent condition of mankind. Indeed, if it were than it would not be necessary to condition to “pursue” it.

I’ve come to believe that justice is a changing concept, which, like every other change that affects the human condition, will have pendulum swings. I’ve also come to the view that justice is indeed in the eye of the beholder, and that it’s not some universal commodity that everyone sees in the same way. I’ve come to believe that justice – and perhaps as importantly “access to justice” – is what one group in society at any particular

time defined it to be; and not infrequently justice is defined not by those who do have the power to make societal decisions, but by those who do not. Let me give you some examples, using events in the United States, which we generally consider to be milestones of justice.

In 1932, persons charged with a capital crime became for the first time entitled to attorneys as a result of *Powell v. Alabama* (287 U.S. 45). Mr. Powell was one of seven black, ignorant and illiterate teenage boys charged with raping a white girl on a freight train passing through Alabama.

In 1938, persons charged with *any* crime became entitled to counsel in the federal courts as a result of *Johnson v. Zerbst* (304 U.S. 458). Mr. Johnson was an enlisted man in the Marine Corps with little education and no funds, who was charged with passing counterfeit \$20-dollar bills.

Twenty-five years later, persons charged with crimes in state courts became entitled to counsel as a result of *Gideon v. Wainwright* (372 U.S. 335). Mr. Gideon, who was also impecunious, was charged with breaking into a poolroom with intent to commit a misdemeanor. I'm sure you know that Mr. Gideon's court-appointed attorney became as famous as he was. He was represented by Abe Fortas, later a Justice of the U.S. Supreme Court.

These examples illustrate the fact that "justice" emerges at times from individual occurrences, which bring sea changes in the societal concept of "justice" – a phenomenon that could be called the "micro-justice" phenomenon. Individuals, whose personal circumstances (like Messrs. Powell and Johnson), or personal initiative (such as Gideon's repeatedly demanding an attorney), can bring about cataclysmic changes in access to justice.

As you well know, there are also "macro-justice" occasions in our city – those historical events that emerge from society's collective conscience. Alexander Solzhenitsyn is the one who said, "Justice is conscience, not a personal conscience but the conscience of the whole humanity."

Again using examples from our own country, I'd put into this category the enactment of states across the country, including Colorado, of laws which provide for no-fault divorce, for mandatory minimum liability insurance coverage for automobile owners, for treble damages and attorney's fees in suits charging deceptive and unfair trade practices, and for so-called lemon laws.

I'd also certainly include as a macro-justice event the creation of the Legal Services Corporation by Congress in 1974 – enacted to provide legal assistance in civil matters to low-income individuals – and perhaps the decision of one state supreme court in 1978 which authorized, and then in 1981 made operative, a program that uses the interest earned on lawyers trust accounts to expand even further the legal services being provided to the nation's low income citizens and residents. That decision, by the way, and the

dedicated commitment of many people across the country – prominent among which was your own Bruce Buell – paved the way for the generation of over \$1 billion for interest on trust account programs in the last 20 years, of which at least 80% has been distributed for the express purpose of providing legal services to the poor.

On the subject of legal services to the poor, let me digress. There is presently pending before the United States Supreme Court a petition for certiorari directed to an *en banc* decision of the Ninth Circuit Court of Appeals which upholds the interest on trust account program of Washington State, on the ground that the program does not effect a "taking" of property under the Fifth Amendment to the U. S Constitution. Needless to say the outcome of these proceedings is being followed with interest by those who support, and by those who oppose, the interest on trust account programs that offer access to justice in the form of legal services for the poor.

Access to justice, of course, is not just an American interest. In 1978, I attended an "Access to Justice" conference of lawyers and judges from all over the world who assembled in Florence, Italy, to examine and critique the international "Access to Justice Movement." This was a follow-up to a 1973 comparative study of "The Quality of Justice," and 1975 study of "Justice for Whom?" Our conference was convened to identify trends that could be found in various societies and cultures for making justice accessible to its citizens – one more step in Deuteronomy's directive to "pursue justice."

We spent four days in discussions, and ultimately concluded that in modern times there are three major, worldwide "waves of reform" in the access-to-justice movement. The first was the attempt to provide legal aid to the poor and the under-represented. The second was the diffusion of collective efforts to make justice accessible, through mechanisms such as class actions, public interest lawyers, and the grant of standing to sue for consumer and environmental groups. The third wave of reform went to beyond simple legal representation to a panoply of procedures and institutions that comprise dispute-processing machinery – such things as small claims courts; the delivery of legal services by para-professionals; legal insurance; and prepaid legal services.

Again as an aside, I have to note for you an interesting "access to justice" issue arose during the Florence conference. For centuries, Irish law prevented Irish wives from divorcing their husbands. While we were sitting in our Access to Justice conference in a monastery overlooking Florence, we learned that a lawsuit had been brought to challenge the Irish law that banned Irish wives from divorce in the World Court, to whose jurisdiction Ireland had submitted itself. Some time after the conference had concluded, I learned that the World Court held that Irish women *should* have the same right to divorce a spouse as Irish men, providing access to justice for Irish women and overriding the centuries old sovereign policy to Ireland to the contrary.

But let's return to the interesting question of whether justice can be too much or too little. I'm confident there has always been too little justice, at least for some groups of persons. But can there be "too much" justice? Here's a situation worth pondering.

Cigarettes are legal commodity in the United States. In a jury trial in Miami, a jury awarded an indeterminate class of up to 500,000 past and present cigarette smokers a cumulative total of \$145 billion – a sum which is claimed to exceed the net worth of the defendant cigarette manufacturing companies. During the trial of this proceeding, the attorney for the plaintiffs’ class, Stanley Rosenblatt, made no bones about the fact that he was asking the jury to render a verdict that would put the cigarette manufactures out of business altogether.

Indeed, he almost achieved that objective already, if you believe the tobacco company defendants who claimed that the verdicts against them were so large that they were unable to post a supersedeas bond, and that they faced execution on their assets by Mr. Rosenblatt if no relief was provided from the Florida money-judgement requirement that appeal bond must be equal in amount to the sum plus two years interest. The tobacco companies contended that the bonding requirement itself was beyond their financial means, and that the effect of denying them relief from the bonding requirement would deny them the opportunity to appeal the judgements.

The trial court was unmoved. It denied them any relief from having to bond the entire verdict amount--but they had another arrow in their quiver. The cigarette manufactures asked the Florida Legislature to enact a statute which would allow them to post supersedeas bonds of no more than \$100 million per company, irrespective of the amount of any judgement against them, as constituting adequate security for the defendants and allowing them to appeal the judgement. The Legislature responded favorable to their request.

This was not entirely unexpected or surprising. The State of Florida is currently receiving from these very companies, and will continue long into the future, to receive hundreds of millions of dollars each year pursuant to the settlement of a national class action of which the State of Florida was a part.

I raise the question, but offer no answer, of whether the jury’s verdict in the tobacco case wrought “justice” between the undefined class of plaintiffs and the cigarette company defendants. Bear in mind that not only is the sale and use of cigarettes quite legal in Florida (and anywhere else in the U. S.), but that many people in Florida and the United States *want* to have the right to smoke cigarettes. Consider also that some of the tobacco company defendants paid Mr. Rosenblatt several million dollars not to challenge the constitutionality of the \$100 million legislative cap on bonds, with none of that sum going to the putative plaintiffs in the lawsuit. Was this “justice”? We won’t know until the appellate courts speak.

I mentioned the three waves of justice that were identified at the Florence conference I attended in 1978. I want to speculate with you as to whether we can now see the beginning of what could be considered an emerging “fourth wave” of justice.

In the late 1940s, the victors in World War II prosecuted a number of German soldiers in Nuremberg, Germany, for acts against humanity, which were committed during World

War II. More recently, the Congress of the United States has considered (and I believe awarded) compensation for those Japanese-Americans who were interned in California at the start of World War II. In 1994, the Florida Legislature passed a statute which provided monetary compensation for any living, African-American resident of the former community of Rosewood, Florida, which suffered what the legislature called “a unique tragedy in Florida’s history.” The statute says

...the State and local government officials were on notice of the serious racial conflict in Rosewood during the entire week of January 1, 1923, and had sufficient time and opportunity to act to prevent the tragedy, and nonetheless failed to act to prevent return; and the State and local government officials thereafter failed to reasonably investigate the matter, failed to bring the perpetrators to justice and failed to secure the area for the safe return of the displaced resident....

These are examples of what I’ll call, for want of a better term, “retributive justice.” In each instance, those directly affected by acts of a government were given “justice” in the form of criminal prosecution of the wrong-doers, or direct compensation as a form of tangible public apology.

We may now be seeing a variation on the notion of retributive justice in the form of what I’ll call, again for want of a better term, “restorative justice.” This manifestation of historical societal conscience is different--it does not emanate from a governmental response to a moral outrage for the benefit of persons who were directly affected. Rather, it emanates from a private motivation to reach back to a time long past, and endeavor to bring present-day societal values to bear on what was a prior societal norm, even though there is no one living who was directly affected by the events that are *now* considered to be “unjust.”

I have in mind the recent class action that was brought to secure compensation for the descendants of African-Americans whose labor as slaves prior to 1865 generated profits for certain business enterprises in the United States. This is an entirely new concept of “justice.” If today’s concept of “justice” can be transposed back in time to an era which had quite different notions of “justice,” than I submit to you there may be no end to the claims that can be conceived. This would, I submit, start a new and quite unique “look – back” wave of justice.

Let me leave you with one further thought on access to justice, and a challenge. I’ve not had occasion to mention justice for that large segment of the population which has income in excess of the guidelines for receiving free legal services, but more than sufficient income to get free legal representation in the innumerable legal situations that present themselves in day-to-day urban or rural life. Who provides justice for the middle class? I doubt that anyone does, frankly. Somehow there has to be a mechanism for changing that. I don’t have a fixed notion of what that mechanism might be. I can throw out one thought on the subject, though, and perhaps it will germinate in the mountain air of this public-minded environment.

I recently met a lady whose children have grown, whose financial needs are adequately met by an income stream from her retirement funds, and whose long-standing penchant to help others less fortunate than herself I still a vital force in her life. She studied to become a psychotherapist, and she is now treating on a pay-as-you're-able basis a number of individuals with incomes over the poverty guideline for free psychological help, who have been diagnosed with split personalities and who have been referred to her by an Arizona welfare agency.

Just talking to her, and listening her enthusiasm for her work, prompted me to wonder if there are lawyers in her position in life, with a similar desire to be productive with their legal skills for the benefit of others. I don't know if the Colorado Bar has an "Elder Law Section" – in Florida we allow attorneys to be certified as specialists in "Elder Law" – but if you have one here it would be a natural place to cultivate attorneys or develop a project to address legal services to middle class Coloradans.

The Bible tells us that justice should not be in short supply, or as Amos put it: "Let justice flow down like waters, and righteousness like an ever-flowing stream." Lawyers for the Washington State and the Texas Interest on Lawyers Trust Account programs are fighting tooth and nail for the IOLTA programs in their federal judicial circuits, and the nation. I'd argue they are proceeding in the spirit of Amos and I for one wish them well.

Thank you

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*This speech was delivered at the Law Day Luncheon of the El Paso County Bar Association in Colorado Springs, Colorado.*