

# THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

## KEYNOTE ADDRESS

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### THE OLD ORDER CHANGES\*

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I join Professor Meador in welcoming you all to this 2005 National Conference on Appellate Justice, a sequel to the 1975 National Conference on Appellate Justice.

The original 1975 Conference got good reviews. We have high hopes for the sequel. The major hallmark of both the original and sequel is the active joint efforts of federal and state judges and academic and practicing lawyers in both the planning and execution of the Conference, as well as the efforts of the National Center for State Courts, the Federal Judicial Center, the N.Y.U. Institute of Judicial Administration, and the American Academy of Appellate Lawyers. We thank the Co-Chairs and Members of the Steering Committee for this well-thought-out program.

In this sequel, we are fortunate to have a handful of the original cast, but we rely mainly on new players. Few of us were on the appellate scene thirty years ago.

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\* Cf. Alfred, Lord Tennyson, *Morte d'Arthur*, in *Tennyson: Selected Poetry* (2d ed., Penguin Books 1953) ("The old order changeth, yielding place to new, . . . Lest one good custom should corrupt the world.") (also available at <http://rpo.library.utoronto.ca/poem/2169.html>).

\*\* Chief Justice, Wisconsin Supreme Court.

In the sequel, the venue has been changed from the sunny Hotel Coronado in San Diego to the depths of the Hotel Hyatt Regency and the intrigues of Washington D.C.

In the sequel, we leave the twentieth century behind and forge into the twenty-first century.

The original version was designed to examine the controversial and disturbing changes that were developing in appellate courts. In the latter half of the twentieth century, appellate courts devised novel internal procedures designed to preserve traditional appellate values in the real world of hugely increasing dockets. The traditional values are that the judges personally decide cases and write opinions. Changes in appellate practice, including increasingly large staffs, had developed over the years and have been woven, as Professor Meador explained, into the appellate fabric.

Yestercentury's innovations to resolve yestercentury's problems have created new problems to be resolved in this century. Problems beget solutions. Solutions beget new problems, and we hope this Conference will beget different or refined innovative solutions.

The 2005 sequel takes stock of the increased volume of appeals and also the new issues brought to the fore by the rapid rate of social, economic, technological, and scientific changes. Technology has replaced predictable progression with change that is exponential. E-everything with electronic filing, discovery of electronic documents, videoconferencing, and computerized and internet research affect the entire judicial system. It appears that nothing stands still long enough for us to get a good handle on it. Our lives, as Learned Hand said in an earlier, easier era, seem to be "made up of a series of judgments on insufficient data, and if we waited to run down all our doubts, it would flow past us."<sup>1</sup>

The first session tomorrow morning will discuss the position of appellate courts today, that is, empirical data about the demand for and supply of appellate services.

The second session will be directed toward the relationship between appellate courts and other institutions of government,

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1. Learned Hand, *On Receiving an Honorary Degree*, in *The Spirit of Liberty* 134, 137 (3d ed., U. Chicago Press 1977).

and between appellate courts and the media and public. This session will focus on the increased visibility of courts.

The third session deals with the challenge of volume in intermediate courts, including the proliferation of appeals filed by self-represented persons, the desirability of maintaining greater openness and transparency in the appellate process, and the effect of technological advances.

The final session will be directed to the law-declaring function of courts and maximizing uniformity and coherence in appellate decisions within a jurisdiction.

A significant difference between the original and the sequel is that a whole day was devoted in 1975 to criminal justice on appeal, probably because of popular dissatisfaction with the slow disposition of criminal appeals, disparity in sentencing, and LEAA partial funding of the first Conference.<sup>2</sup> Criminal justice issues, although the source of many TV dramas these days and much public concern, are not highlighted in the sequel.

Well-known stars make cameo appearances as panelists in this sequel. The panelists will begin each session, but a stellar cast, namely you all functioning in break-out groups, will play the final scenes in each session. Thus the sequel, like the original, is largely unscripted. The break-out groups will write their own script. (Hollywood has finally adopted this approach; it's a new genre called "reality," and it's the hottest thing going.) The success of this venture thus depends on each of us. My task is to get your appellate juices flowing.

Professor Maurice Rosenberg in his welcome at the 1975 Conference reminded the participants that

Everyone is aware that it's a bit pretentious for a Conference to have serious objectives. From Fred Allen we know that a Conference is a gathering of important people who singly can do nothing about a problem, but together can decide that nobody can do anything about it.<sup>3</sup>

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2. See generally Advisory Council for Appellate Justice, *Appellate Justice: 1975—Materials for a National Conference* vol. III (*Criminal Justice on Appeal*) (Nat. Ctr. for St. Cts. & Fed. Jud. Ctr. 1974) [hereinafter *Appellate Justice: 1975*].

3. Maurice D. Rosenberg, *Remarks: Welcome* in *Appellate Justice: 1975*, *supra* n. 2, at vol. V, 46, 48 (*Supplement, Proceedings, and Conclusions*).

Professor Rosenberg urged: "We who are here can [do something]." <sup>4</sup> I too say to you: "We who are here can do something."

The sequel, like the original, is action oriented. The Conference will be of little enduring value unless ideas refined here are put into practice. In Wisconsin we have a rule that every attendee at a national conference is expected to bring back at least one good idea and to put it into effect. The organizers have similar expectations of you. They expect that court systems in the immediate years ahead will point to this Conference as the impetus for improvements in the appellate process.

We must be prepared to experiment, scrapping methods that do not work and turning to others that may. The 1975 Conference concluded, as we should conclude, with a strong consensus that "improvement should not be impeded by the quest for perfection." <sup>5</sup>

The dialogue will, I am sure, be diverse and wide ranging. There is, however, a backdrop for the dialogue, a unifying theme for the Conference. The unifying theme is expressed in the very title of both this Conference and the original Conference: National Conference on Appellate *Justice*. The emphasis is on the word Justice, however defined. Justice for the litigants, the consumers of court services.

Justice can be calculated by speed and efficiency in finishing cases, but also can be measured in less quantifiable terms, like serving liberty; fostering dignity, respect, and equality of persons; adhering to the law; and producing better outcomes for individuals, communities, and society at large.

We must test the appellate process from the vantage point of the consumers of justice and the lawyers who represent them. We need to think about how to organize the courts so that they operate for the benefit of the users, not merely the providers.

Any particular case we hear may not, from our standpoint, be of great historical or legal effect, but each case is crucial to the parties involved. Indeed, victims, defendants, witnesses, and the public in general express concern for our lack of empathy for participants in the justice system. From the consumers'

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4. *Id.*

5. Paul D. Carrington, *Report on Group Discussions* 62, 76, in *Appellate Justice: 1975*, *supra* n. 2, at vol. V (*Supplement, Proceedings, and Conclusions*).

standpoint, we do not seem to care about the impact of the court experience on people's lives. Fair and impartial decisionmaking cannot mean that we are disinterested in the plight of the parties.

Fifteen years ago I wrote that if asked, consumers would tell us:

This is my court, a people's court, not the lawyers' or judges' court. The court does not belong to the professionals. You all work for me. I pay your salaries. What do you mean you have to save yourselves for the important cases? If I come to your court with my problems, it is the important case.<sup>6</sup>

Although courts should seek input from lawyers and consider their needs in the appellate process, neither courts nor lawyers should operate for their own benefit or the benefit of each other. We are not about making life easier for judges, lawyers, or court staff. Rather we exist and toil together to advance the interests of litigants, whether individual, corporate, or governmental. Only by focusing on the consumers of our services (and the lawyers who represent them) will we maintain the public's trust and confidence in the legal system. Of course, maintaining public trust and confidence is not the same as guaranteeing the popularity of our opinions.

The public would shine a big bright spotlight in this sequel on access to justice. The late Judge Richard Arnold wisely wrote that we should "think of courts, state or federal, as places where anybody can come in and say, 'I am a human being. I am here. . . I have law. (I think I do anyway.) So judge my case . . .'"<sup>7</sup>

The cost of access to justice—whether measured in terms of money, time, or the procedures to be followed—should be reasonable, fair, and affordable. Legal services for the indigent have historically been underfunded, and the legal system must help by creating funding for civil legal services and encouraging increased pro bono activities by lawyers.

The proliferation of self-represented parties concerned about the high cost of legal services poses serious challenges and opportunities for our courts and the bar; courts are designed

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6. Shirley S. Abrahamson, *The Consumer and the Courts*, 74 *Judicature* 93, 94 (Aug.-Sept. 1990).

7. Richard S. Arnold, *The Future of the Federal Courts*, 60 *Mo. L. Rev.* 533, 545 (1995).

to operate with licensed lawyers trained in law and court rules. We must assist litigants in their efforts to represent themselves. We must, when necessary, revamp and simplify procedures for a user-friendly, comprehensible court system.

Access to justice does not exist unless we provide qualified interpreters to litigants and witnesses who do not understand the English language. Fortunately, America is still an immigrant nation, with people coming from all over the world to live in communities that traditionally have not been home to immigrants. State and federal courts can help each other in this endeavor to provide qualified interpreters.

Access to justice means access to fair, impartial, and neutral decisionmaking. We must turn a big, bright spotlight on the independence of the judicial branch, a phrase rich with meaning to us, but not one that necessarily resonates with the public.

Consumers expect resolution of their disputes in a court free from ideology or agenda and free from direct or indirect improper influences, inducements, threats, or interference from the political branches of government, the public, or special interest groups.

Anything that detracts from the expectation of impartiality and neutrality is a threat to courts and the separation of powers. In our form of government, courts are, as Professor Sunstein has written, essential “participants in the system of democratic deliberation.”<sup>8</sup> The judiciary’s powers and responsibilities rest on the democratically adopted state and federal constitutions, which recognize the roles of the three branches, separation of powers, and checks and balances.

Courts are inevitably in conflict with the other two branches as more and more polarizing, culture-war topics appear as legal questions to be adjudicated—abortion, capital punishment, assisted suicide, medical uses of marijuana, tort reform.

In recent years repeated attacks on the judicial system and a continuing drumbeat of harsh criticism widely circulated through modern means of communication have posed a threat to fair, impartial, and neutral decisionmaking.

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8. Cass R. Sunstein, *The Supreme Court 1995 Term: Foreword: Leaving Things Undecided*, 110 Harv. L. Rev. 6, 101 (1996).

Professor Meador has described courts of last resort as “more placid waters to the rear, where they can think great thoughts and control their swelling dockets by denying review.”<sup>9</sup> True, courts of last resort may deny review, but we know that heat rises, and courts of last resort take, I think, the brunt of the heat of criticism.

Courts should not be free from criticism. I concede that neither you nor I likes to be criticized or suffers criticism painlessly. The truth is that our preference is for praise—frequent and profuse.

A difference does exist, although the line is difficult to draw, between criticism within the bounds of a free, democratic society, and violent and brutal threats attempting to bully and intimidate judges or lawyers and to erode the legitimacy of courts. The threat may be condoning physical retribution or removing a judge by recall, election, or impeachment on the basis of a single opinion. Threats to courts are threats to access to justice.

Let me tell you about a group calling itself South Dakotans for Judicial Accountability. Apparently, a national campaign is underway to adopt constitutional amendments called Judicial Accountability Initiative Laws. The acronym is J.A.I.L.—Jail. Check the website: Jail4Judges.org. According to a proposed constitutional amendment in South Dakota, Special Grand Juries of thirteen members would have the power to strip judges of their protection of judicial immunity, to investigate and initiate criminal prosecution of wayward judges, and to hold judges personally accountable for decisions not in compliance with state laws. If you view this effort with disbelief or amusement, reconsider: The group has apparently collected more than the 33,500 signatures needed to put the measure on the South Dakota ballot.<sup>10</sup>

We have to keep the vitriolic rhetoric in perspective. Courts have always been subject to criticism. Chief Justice John

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9. Daniel J. Meador, *Introduction to the National Conference*, in 8 J. App. Prac. & Process 71, 72 (2006).

10. Ron Branson, *The Wick Has Been Lit and the Explosion Is Forthcoming!* J.A.I.L. News Journal, [http://www.jail4judges.org/JNJ\\_Library/2005/2005-12-23.html](http://www.jail4judges.org/JNJ_Library/2005/2005-12-23.html) (Dec. 23, 2005) (accessed Apr. 29, 2006; copy on file with Journal of Appellate Practice and Process).

Marshall was nearly impeached in an effort fostered by Thomas Jefferson. The venerable Chief Justice did not have a public information officer or the Bar to protect him. Instead, apparently he wrote letters to the editor in his own defense using a pseudonym.<sup>11</sup>

President Theodore Roosevelt, unhappy with a U.S. Supreme court ruling, wrote of Justice Oliver Wendell Holmes that the President could carve out of a banana a judge with more backbone than Holmes displayed.<sup>12</sup>

In the 1930s, President Franklin D. Roosevelt threatened court packing as a means of changing court decisions.

In the 1950s, members of Congress urged disobedience to *Brown v. Board of Education*.<sup>13</sup> The country recently celebrated the fiftieth anniversary of this landmark decision.

In the 1960s, "Impeach Earl Warren" signs and billboards dotted the country, demonstrating public disagreement with criminal justice decisions.<sup>14</sup>

At the 1975 Conference Judge Carl McGowan made merely a brief reference to threats as follows:

Today, despite the fact that the prestige of the courts has never been higher, they are faced with a variety of differing "indirect" assaults. Some are of their own making. Those from without, happily, are mainly devoid of hostile purposes, and are often indeed the consequences of either neglect and indifference or exaggerated respect for judicial capabilities. I think we may confidently hope that this Conference will be of great value in turning all of them back.<sup>15</sup>

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11. See e.g. Kevin S. Burke, *A Court and a Judiciary That Is As Good As Its Promise*, 40 Ct. Rev. 4, 4 (2003).

12. See e.g. Richard D. Friedman, *Tribal Myths: Ideology and the Confirmation of Supreme Court Nominations*, 95 Yale L.J. 1283, 1298 (1986) (reviewing Laurence H. Tribe, *God Save This Honorable Court: How the Choice of Supreme Court Justices Shapes Our History* (Random House 1985)).

13. 457 U.S. 483 (1954). The Southern Manifesto, expressing Congressional opposition to *Brown*, can be found at 102 Cong. Rec. 4459, 4460 (statement of Sen. Walter F. George).

14. See e.g. William G. Ross, *Attacks on the Warren Court by State Officials: A Case Study of Why Court-Curbing Movements Fail*, 50 Buff. L. Rev. 483, 505-06 (2002).

15. Carl McGowan, *Remarks: Conclusion*, in *Appellate Justice: 1975*, *supra* n. 2, at vol. V, 99, 124 (*Supplement, Proceedings, and Conclusions*).



And what can the legal system and this Conference do in the face of threats in 2005? Well, we cannot allow intimidation to undermine our system of fair and impartial courts. We cannot abandon our oath of office to uphold the constitution or our role as protector of constitutional rights.

To protect access to justice for all and the people's rights under the Constitution we—judges, lawyers, and the public—must vigorously defend fair and impartial courts from political interference and special interest groups. We must focus our efforts on advancing the separation-of-powers, checks-and-balances role of the courts. We must emphasize the role of the courts as an important part of our democracy providing an essential balance in our government for protection of the people.

Balanced against judicial independence is judicial accountability. Accountability is not at war with the concept of judicial independence. As we sit in judgment of others, we are, and should be, judged. No person or institution in our system of government and the rule of law is above the law. Courts are accountable.

But to whom are courts accountable and how?

The court system is accountable to the public for the use of public resources. It is accountable to participate in the improvement of justice; to negotiate structural changes to ensure that it remains relevant as a provider of justice; to engage with the community in the important questions of justice; to build a constituency for the courts by helping educate the public about the role played by courts and by inviting the public to become directly involved in court processes as volunteers and advisers.

The courts are accountable to the Constitution and the rule of law. They are accountable as guardians of constitutional rights.

Errant attorneys and judges must be held accountable for violations of codes of professional responsibility. Once probable cause to charge a lawyer or judge is established, the disciplinary proceeding should be open to the public to assure the public that our disciplinary mechanisms are not just self-protection agencies.

Finally, another spotlight must shine on the interrelationship of federal, state, and tribal courts. The state courts do more than ninety-five percent of the country's judicial

business.<sup>16</sup> Federal, state and tribal courts have overlapping and concurrent jurisdictions and face similar issues in appellate practice.

The public does not distinguish between municipal and magistrate courts, intermediate appellate courts and courts of last resort, and federal and state courts. The public expects all appellate court judges to understand the work of trial courts and all trial court judges to understand the work of appellate courts, so that all levels of courts may better serve the litigants. I suggest that each of us judges trade benches periodically, a practice already established at the federal level and followed in some states.

Try sitting as a trial judge, even with its dangers, the main one being reversal on appeal. You'll be in good company. Chief Justice Rehnquist sitting as a trial judge was apparently overturned by the court of appeals.<sup>17</sup> I recently sat as a small claims court judge in Milwaukee. That's a court where many of our people meet justice. It is a humbling experience! Trial judges are real judges. They see the litigants and witnesses and make decisions on the spot; they don't just read other people's papers and check out the law with assistants.

Lawyers should sit on moot courts and see lawyers' performances from the perspective of a judge.

Federal, state, and tribal courts and lawyers can learn from each other. The American Academy of Appellate Lawyers, the Federal Judicial Center, the National Center for State Courts, and the Institute of Judicial Administration, as well as other

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16. See e.g. Thomas E. Baker, *A View to the Future of Judicial Federalism: "Neither out Far nor in Deep,"* 45 Case Wes. L. Rev. 705, 716 (1995) (citing Frank M. Coffin, *On Appeal—Courts, Lawyering, and Judging* (W. W. Norton & Co. 1994) and Vincent L. McKusick, *Combining Resources*, Natl. Law J. 13 (Nov. 19, 1990)).

17. See *Heislup v. Colonial Beach*, 813 F.2d 401 (4th Cir. 1986) (table), *cert. denied*, 482 U.S. 909 (1987) (indicating that "the Chief Justice took no part in the consideration or decision of this petition"). Although the LEXIS report of the Fourth Circuit's decision indicates that Judge D. Dortch Warriner of the United States District Court for the Eastern District of Virginia at Richmond presided over the trial, both the Fourth Circuit's official unpublished opinion and the Westlaw version include this notation: "William H. Rehnquist, Associate Justice of the United States Supreme Court, sitting by designation." Readers interested in learning a bit more about then-Justice Rehnquist's involvement in *Heislup* can consult Justice Ginsburg's brief description of the case in a recent issue of the Harvard Law Review. See Ruth Bader Ginsburg, *In Memoriam: William H. Rehnquist*, 119 Harv. L. Rev. 6, 7 (2005).

research and educational organizations, must cooperate in their efforts to educate judges, lawyers, and staff and foster cooperative efforts. Perhaps the now-defunct *Federal-State Judicial Observer*, a newspaper in the 1990s that published news and commentary of interest to the state and federal judiciary, should be revived as a *Federal-State-Tribal Observer*, published at least on the web sites of the Federal Judicial Center and the National Center for State Courts.

Lots to do and lifetimes in which to do it.

I conclude with Roscoe Pound's closing words in his famous 1906 speech on "The Causes of Popular Dissatisfaction with the Administration of Justice." He concluded with an expression of hope, saying, "We may look forward to a near future when our courts will be swift and certain agents of justice, whose decisions will be acquiesced in and respected by all."<sup>18</sup> I also have hope, but as a realist I suggest we probably need at least another hundred years to realize Pound's dream.

I remind you that we are gathered here to welcome ideas and concerns and differences of opinion as together we serve the people of this country. The people of the country deserve no less.

I look forward to an outstanding Conference, to working with all of you in the coming years, and to joining you at the third National Conference on Appellate Justice thirty years hence. Until then, good night and thank you.



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18. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice* in *Handbook for Judges* 143, 161 (Kathleen M. Sampson ed., Am Judicature Society 2004).

