

THOMAS E. FAIRCHILD LECTURE

OUR JUSTICE SYSTEM AT AN INFLECTION POINT

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When John Skilton called to invite me to present the Fairchild Lecture, I was honored and humbled. I knew of the distinguished list of eminent scholars, practitioners, and judges who have given this lecture on prior occasions. I am not sure that I belong in such distinguished company, but I will endeavor to honor their work and the legacy of Judge Fairchild.

On the official webpage for the Fairchild Lecture it is stated: “For 50 years, Judge Fairchild demonstrated both a scholarly regard for those principles of law that generations have modeled into the American definition of justice and equality and a remarkable sensitivity to the ever-changing human conditions that make the search for justice and equality an ongoing one.”²

I hope this afternoon to indeed focus on those principles of justice and equality and the changing human conditions that Judge Fairchild knew that we must consider and adapt to if we hope to maintain and strengthen justice and equality in our great nation.

We face changing conditions in four key areas: 1) the politicization of the judiciary, which threatens its independence, 2) systemic inequality through unequal access to quality education, 3) lack of

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1. The text of this address is the version as prepared for delivery. The speaker thanks Carmen Harper Thomas, his partner at Nelson Mullins Riley & Scarborough LLP, for her research and editing assistance.

2. *Thomas E. Fairchild Lecture*, UNIV. WIS. LAW SCH., <https://law.wisc.edu/alumni/fairchild.html> [<https://perma.cc/C7GS-WE23>] (last visited Mar. 5, 2017).

accessible and affordable civil justice, and 4) deep flaws in our criminal justice system.

It is time for courage, strong leadership, and sustained effort. In a recent interview, David Brooks said to Oprah Winfrey that our most important work will not be finished in our lifetime.³ Indeed, it was Judge Fairchild's recognition that the search for justice and equality is an ongoing one. Let us search together this afternoon, and I humbly hope to provide some light for our journey.

It was March 26, 2012; there were people of all colors, all ages. They wore every type of clothing, from t-shirts emblazoned with slogans, to running gear, to suits. There were doctors and medical students in white coats. There were posters and buttons of every size and color. Some people had megaphones, and others tried to out shout their opponents. There was even a trumpeter and a trombonist.

It was the Plaza of the United States Supreme Court. It was the first day of oral arguments to determine the constitutionality of the Patient Protection and Affordable Care Act, or in the vernacular, Obamacare.⁴

It was a cacophony and a montage all at once. It was America.

Above it all, on the west pediment of the Supreme Court are the words we know so well: "Equal Justice Under Law." These words are the embodiment of the justice that we seek as Americans; justice fairly applied, regardless of class, race, gender, sexual orientation, disability, or station.

Having breathed in the fullness of that moment in March 2012, I sought a quiet place. I walked around the magnificent Supreme Court to the east side. No one was there. It was eerily calm and quiet. I looked up to the pediment. There, above the east side columns are these words: "Justice the Guardian of Liberty."

All men and women—of every class, race, gender, sexual orientation, disability, and station—seek liberty and freedom. Liberty and freedom to explore, to learn, to earn, to have a family, to make a difference.

It is that yearning for liberty and freedom that gave courage to the Barons to confront King John at Runnymede on June 15, 1215. Magna Carta was sealed. Liberty was born. Clause 39 of the 1215 Magna

3. *Super Soul Sunday*, OPRAH (Dec. 3, 2015), <http://media.oprah.com/video/201511/sss/vod/20151203-sss-619-brooks-episode-vod.xml> [https://perma.cc/2Q8S-4MYJ].

4. *Nat'l Fed'n Int'l Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

Carta⁵ is the direct antecedent of the Fifth and Fourteenth Amendments—our own country’s constitutional guarantees of due process; our country’s commitment to equal protection under law; our country’s commitment to justice, the guardian of liberty.

These documents—Magna Carta and the United States Constitution—embody precepts of liberty and freedom. But it takes a commitment by lawyers, by judges, and by all citizens to breathe life into the documents, and to make them real in the lives of women and men.

One of our most venerated jurists, Learned Hand, knew this when he said, “Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can even do much to help it.”⁶

Though precepts of justice and equality long preceded the founding of our nation, it is in America that these precepts have been nourished, enlivened, and made manifest in the lives of our people. We should be proud that the American justice system has been, and continues to be, the envy of the world.

Consider the differences in countries without the same commitment. Like the United States, the Constitution of China protects individual property rights.⁷ Yet, Chinese citizens answering the World Justice Project survey rank their country very poorly when asked if the government expropriates without adequate compensation—ranking China 71st out of 102 countries in the 2015 World Justice Project’s Rule of Law Index, only ahead of countries like Uzbekistan, Venezuela, and Zimbabwe.⁸

Or consider Turkmenistan. Their constitution guarantees an impressive array of human rights—more than are found in the United States Constitution.⁹ Yet the United Nations has said that Turkmenistan “systematically does not respect the right to freedom of expression.”¹⁰ Discrimination, restrictions on religious freedom, and limited freedom of association pervade that country.

Why are the rights written on paper not realized? Why are they only ink on a page?

A lack of judicial independence is a major factor. Courts in these countries are pressured to decide cases in accordance with government

5. MAGNA CARTA OF 1215 cl. 39 (Eng.). “No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.” *Id.*

6. LEARNED HAND, *THE SPIRIT OF LIBERTY* (1944).

7. XIANFA art. 13 (1982) (China).

8. WORLD JUSTICE PROJECT, *RULE OF LAW INDEX 6* (2015).

9. THE CONSTITUTION OF TURKMENISTAN, § 2 (draft as of July 21, 2016).

10. UNITED NATIONS HUMAN RIGHTS COMM., FOLLOW-UP REPORT ON TURKMENISTAN TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE 6 (2014).

and executive demands. Another major factor is that their bar associations are not independent and are, in fact, beholden to the government. As a consequence, they are weak.

Lawyers who called for direct election of Beijing bar association officers in 2008 were forced to leave their firms.¹¹ The Chinese government has arrested, intimidated, and harassed lawyers who defend unpopular clients.¹²

A former head of the Supreme Court in China said, “The power of the courts to adjudicate independently doesn’t mean at all independence from the Party. It is the opposite, the embodiment of a high degree of responsibility vis-à-vis Party undertakings.”¹³

These international examples confirm that without truly independent lawyers and judges, the rights written on paper remain just that: ink on paper.

At the High Court Symposium at The Hague in July 2013, sponsored by the World Justice Project, Justice Kennedy stated, “Judicial independence is not so we can do what we want, but so we can do what we must.”¹⁴

We saw that independence, indeed that courage, in Judge Fairchild’s dissent in *Ross v. Ebert*,¹⁵ stating that if a union restricted membership based on race, that restriction would deny the black applicants the equal protection of the laws.¹⁶

In an interview on February 3, 2016, at the New England School of Law Boston, Chief Justice Roberts expressed concern that people do not have a very good understanding of how the judicial branch is different from the political branches of government, and how the role of judges differs from those in the executive and legislative branches.¹⁷

11. *Chinese Lawyers Who Called for Bar Elections are Fired*, N.Y. TIMES (Oct. 6, 2008), <http://www.nytimes.com/2008/11/06/world/asia/06iht-beijing.1.17584310.html> [<https://perma.cc/B4PA-REC5>].

12. Letter from Richard Goldstone, J., & Martin Šolc, Int’l Bar Ass’n Human Rights Inst. Co-Chairs, to Wen Jiabao Guojia Zongli, Former Prime Minister of China, Int’l Bar Ass’n (June 19, 2009), http://www.ibanet.org/Human_Rights_Institute/About_the_HRI/HRI_Activities/HRI_Media/HRI_Interventions/Int_China_June09.aspx [<https://perma.cc/YPN6-LQTY>].

13. HUMAN RIGHTS WATCH, “WALKING ON THIN ICE”: CONTROL, INTIMIDATION AND HARASSMENT OF LAWYERS IN CHINA 17 (2008).

14. The High Court Symposium was sponsored by the World Justice Project, and the author, as chair of the board of the World Justice Project, was present for Justice Kennedy’s remarks.

15. 82 N.W.2d 315 (1956).

16. *Id.* at 322 (Fairchild, J., dissenting).

17. *Inside the Supreme Court*, C-SPAN (Feb. 3, 2016), <https://www.c-span.org/video/?404131-1/discussion-chief-justice-john-roberts> [<https://perma.cc/5SLT-E4VZ>].

Chief Justice Roberts continued by expressing concern that the confirmation process is not functioning very well.¹⁸ He noted that in the confirmations of Justice Scalia and Justice Ginsburg there were only a handful of dissenting votes between the two of them.¹⁹ In the last three confirmations, he noted, the votes were almost strictly along party lines.²⁰ He said, “That doesn’t make any sense.”²¹ He continued by observing that the process is being used for something other than the qualifications of the nominees, which increases the danger that whoever comes through the process will be viewed in overly political terms.²²

This interview of Chief Justice Roberts was on February 3, 2016. Justice Scalia died ten days later.

The politization of the confirmation process has reached a new level when senators refuse to consider, under any circumstances, the nominee for the position of justice of the Supreme Court.

In my judgment, this stance further causes people to lose confidence in the independence of the judiciary and further erodes confidence in our most basic institutions of government. Similarly, as we have seen most recently here in Wisconsin and in Kansas, the surge of money to support judicial candidates or to seek to remove judges²³ undermines the public’s confidence in the fairness of our courts.

Our system is not always perfect in application. It does indeed falter. But as Supreme Court Associate Justice Lewis Powell said in 1965, while he was serving as ABA President, “In the final analysis, the only viable alternative to the rule of force is the rule of law.”²⁴ It is incumbent upon all of us—it is our burden and our privilege—to ensure that our government and our citizens remain true to the Constitution and to the rule of law.

But it has been a journey in our own country marked by great injustices and great triumphs. To overcome slavery, we had to overturn Supreme Court decisions and to endure the greatest human carnage in the history of our country—the Civil War. But, of course, that did not end injustice or inequality. It took another great struggle led by Dr. King to give us renewed hope that the dignity of all humans would be respected. It also took great courage by lawyers and judges to bring justice and equality to those long denied.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. CHRIS W. BONNEAU, A SURVEY OF EMPIRICAL EVIDENCE CONCERNING JUDICIAL ELECTIONS 5 (2012); *see also* Charles G. Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L. REV. 43, 52 (2003). *But see* CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS (2009).

24. Lewis Powell, *The President’s Page*, 51 A.B.A.J. 505, 507 (1965).

When the United States Supreme Court heard *Brown v. Board of Education*,²⁵ it actually combined five separate cases into one case and issued a single opinion deciding all five of them. One of those five cases was a case called *Briggs v. Elliott*,²⁶ which arose in Summerton, South Carolina, and which was tried in the federal courthouse in Charleston, South Carolina.²⁷ Of the five cases, *Briggs* was especially important because it was the only case where one of the trial judges issued an opinion ruling with the African-American plaintiffs.²⁸

Plaintiffs were a group of twenty African-Americans, including Harold Briggs, from Summerton, South Carolina, which is in the rural, southeastern part of the state.²⁹ The plaintiffs had children who attended the local public high school for African-Americans.³⁰ While the school was supposed to be “equal” to the white public school, it was not, as was the case almost everywhere. The black school had far fewer resources than the white school.³¹ The case started out with the plaintiffs simply asking the school board to provide the black school with a school bus, like the one given to the white school.³² The school board denied the black school’s request.³³ The federal judge in Charleston who had the case encouraged the lawyer for the plaintiffs, Thurgood Marshall, to go further, and to challenge the entire concept of racial segregation in the case, rather than simply asking for “separate but equal.”³⁴ The name of the federal judge in Charleston was Waties Waring.³⁵

Judge Waring was a native of Charleston and the son of a Confederate veteran,³⁶ so he was not the most likely judge to rule in favor of African-American civil rights. During his years as a judge, he saw several cases where African-Americans were treated unfairly under the law, and his views became more and more progressive. For example, Judge Waring held that it was unconstitutional to pay black

25. 347 U.S. 483 (1954).

26. 98 F. Supp. 529 (E.D.S.C. 1951).

27. *Id.* at 529, 539.

28. *Id.* at 538, 548.

29. *Id.* at 529–31.

30. *Id.* at 530–31.

31. *Id.* at 531.

32. *Briggs v. Elliott (South Carolina)*, CIVILRIGHTS.ORG, <http://www.civilrights.org/education/brown/briggs.html> [https://perma.cc/WF74-6S9N] (last visited Feb. 20, 2017).

33. *Id.*

34. *Id.*

35. *Briggs*, 98 F. Supp. at 538.

36. *How the Son of a Confederate Soldier Became a Civil Rights Hero*, NPR.ORG (Apr. 10, 2014), <http://www.npr.org/sections/codeswitch/2014/04/10/301432659/how-the-son-of-a-confederate-soldier-became-a-civil-rights-hero> [https://perma.cc/WWQ7-KFR7].

teachers significantly less than their white counterparts who had similar education and experience.³⁷

In another example, Judge Waring issued an opinion requiring the South Carolina Democratic Party—which was the only party that had any power at the time—to permit African-Americans to participate in their primary elections.³⁸ In his opinion, Judge Waring said that it was “time for South Carolina to rejoin the Union.”³⁹ Judge Waring was persecuted for his progressive beliefs. A cross was burned in his yard, rocks were thrown through his window, he received death threats, and the legislature attempted to impeach him.⁴⁰ After these cases, the case of *Briggs v. Elliott* came along in 1951.

The trial was held on May 28, 1951, in the federal courthouse in Charleston, South Carolina, on the corner of Broad Street and Meeting Street, in a courtroom that is still used to this day. Caravans of African-Americans, mostly from Summerton, came to Charleston to see the trial or stand outside the courthouse. Judge Waring watched the crowd outside the courthouse from his office window. He was quoted as saying, as he looked out of the window, “To me, it’s awfully heartening” when people “suddenly sniff a little breath of freedom.”⁴¹ The trial was conducted in front of Judge Waring and two other judges.⁴² The two other judges ruled in favor of the school, requiring the school board to provide more equal facilities to the black school, but refusing to find segregation unconstitutional.⁴³ Judge Waring disagreed with the other two judges and wrote a long dissenting opinion. In his dissent, Judge Waring wrote, “segregation in education can never produce equality and . . . it is an evil that must be eradicated.”⁴⁴

The decision of the court was appealed to the United States Supreme Court.⁴⁵ *Briggs* was combined with four other cases—one from Kansas, one from Virginia, one from Delaware, and one from

37. *Thompson v. Gibbes*, 60 F. Supp. 872, 873, 877–79 (E.D.S.C. 1945).

38. *Elmore v. Rice*, 71 F. Supp. 516 (E.D.S.C. 1947).

39. *Id.* at 528.

40. Brian Hicks, *Judge Waring’s Fight for Justice is Honored at Last*, POST & COURIER (Oct. 1, 2015), http://www.postandcourier.com/staff/brian_hicks/judge-waring-s-fight-for-justice-is-honored-at-last/article_4602ff31-a088-57c1-b2fa-0443ac755da5.html [https://perma.cc/43YD-N3Z9].

41. Associated Press, *Judge Who First Wrote Separate is Not Equal Lauded*, DAILY MAIL (Apr. 5, 2014), <http://www.dailymail.co.uk/wires/ap/article-2597695/Judge-wrote-separate-not-equal-lauded.html#ixzz4YPQZpaZn> [https://perma.cc/73ML-Q43Q].

42. *Briggs v. Elliott*, 98 F. Supp. 529, 530 (E.D.S.C. 1951).

43. *Id.* at 537–38.

44. *Id.* at 547–48.

45. *Brown v. Bd. of Educ.*, 347 U.S. 483, 483 (1954).

Washington, D.C.⁴⁶ All of the cases involved the question of whether racial segregation in public schools was allowed under the United States Constitution.⁴⁷ The case from Kansas was called *Brown v. Board of Education*, and the Court referred to all five cases under that name.⁴⁸ On May 17, 1954, almost sixty-two years ago, the Supreme Court issued its opinion in *Brown*.⁴⁹ The Supreme Court decided 9-0 that racial segregation in public schools is unconstitutional.⁵⁰ The Supreme Court's opinion draws heavily from Judge Waring's dissent in *Briggs*.⁵¹ Of all the five cases that were consolidated under *Brown*, Judge Waring was the only lower court judge who stated that racial segregation was unconstitutional.⁵²

But over sixty years after *Brown v. Board of Education*, the promise of *Brown* remains largely unmet.

As noted by *New York Times* columnist Nicholas Kristof in his column on April 2, 2016, "The average white or Asian-American student attends a school in at least the 60th percentile in test performance; the average black student is at a school at the 37th percentile. One reason is an unjust school funding system that often directs the most resources to privileged students."⁵³

It takes sustained effort over long periods of time to do the really important work.

In my state, a close friend and law partner, Steve Morrison, devoted ten years of his life and significant pro bono time to a landmark public education case, *Abbeville v. South Carolina*.⁵⁴ Plaintiffs brought the original suit twenty-one years ago on behalf of poor, rural school districts seeking to hold the state to its constitutional obligation to provide every child the opportunity to acquire an adequate education.⁵⁵

In his closing argument before the trial court in 2004, Steve recounted an African parable about babies found floating down a river. "We have to get these babies out of the river," a young fisherman exclaimed as he scrambled to pull them out. As an older fisherman began walking away, the young man protested. But the elder explained,

46. *Id.*

47. *Id.* at 486-88.

48. *Id.* at 486.

49. *Id.*

50. *Id.*

51. *See generally id.*

52. *Briggs v. Elliott*, 98 F. Supp. 529, 548 (E.D.S.C. 1951).

53. Nicholas Kristof, *When Whites Just Don't Get It, Part 6*, N.Y. TIMES (Apr. 2, 2016), https://www.nytimes.com/2016/04/03/opinion/sunday/when-whites-just-dont-get-it-part-6.html?_r=0 [<https://perma.cc/S3NA-92L3>].

54. *Abbeville Cty. Sch. Dist. v. South Carolina*, 515 S.E.2d 535 (S.C. 1999).

55. *Id.* at 538.

“You help as many of the babies as you can. I’m going upriver to see who’s throwing babies into the river.”⁵⁶

In other words, we need to focus on the root causes of injustice, not just its symptoms. Steve worked hard on *Abbeville* and, sadly, died in October 2013. But the efforts of Steve, Carl Epps, and their team paid off. The South Carolina Supreme Court finally ruled for the plaintiffs in November 2014, directing the state legislature of South Carolina to work with the school districts to ensure adequate educational opportunities for all the State’s children.⁵⁷

This is an obvious victory for equal opportunity. Educational opportunity is also an important issue for the bar because of our commitment to eliminate bias and enhance diversity in our profession and the justice system. To meet this critical goal, we must look upstream at how best to nurture our children’s capabilities.

More than sixty years ago, lawyers played an important role in securing the decision to make education available on an equal basis in *Brown v. Board of Education*. Yet, despite the valiant efforts of pro bono and public interest lawyers, we are still far from securing the basic right of an adequate education, on a consistent basis, for all children, particularly for those from low income families, children of color, children with disabilities, and others from at-risk environments.

The problem is particularly acute in the “school-to-prison” pipeline, in which disadvantaged students, especially those who need special education or social assistance, are often neglected.⁵⁸ Minority students are disproportionately represented in this population as they often attend failing schools, are subject to zero-tolerance discipline policies, and drop out in high numbers, if they are not suspended or expelled first.⁵⁹ Many become involved with the criminal justice system and are sent to detention facilities.⁶⁰

The school-to-prison problem is pronounced in Wisconsin, which ranks seventh highest in the number of student referrals for discipline among the fifty states according to Department of Education data.⁶¹ Its

56. See Nelson Mullins, *Steve Morrison Scholarship Video*, YOUTUBE (Jan. 27, 2017), https://www.youtube.com/watch?v=F0GI_qPMU70 [<https://perma.cc/XTQ6-SKEY>].

57. *Abbeville Cty. Sch. Dist. v. South Carolina*, 767 S.E.2d 157 (S.C. 2014).

58. *Pipeline to Prison: Special Education Too Often Leads to Jail for Thousands of American Children*, HECHINGER REPORT, <http://hechingerreport.org/pipeline-prison-special-education-often-leads-jail-thousands-american-children/> [<https://perma.cc/Y8XK-F3MB>] (last visited Feb. 24, 2017).

59. *School-to-prison Pipeline*, ACLU, <https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline> [<https://perma.cc/8ML7-SZB8>] (last visited Feb. 24, 2017).

60. *Id.*

61. CHRIS ZUBAK-SKEES, CTR. FOR PUB. INTEGRITY, A STATE-BY-STATE LOOK AT STUDENTS REFERRED TO LAW ENFORCEMENT,

discipline referral rate of 10.2 students per thousand is significantly higher than the national average of 5.8 students per thousand.⁶²

Suspension and expulsion from school may seem minor compared to an arrest. However, expulsion is the number-one predictor—more than poverty—of whether children drop out of school completely, and walk down a road that includes greater likelihood of unemployment, instability, and incarceration.⁶³

But attorneys in Wisconsin are becoming engaged in a solution to the problem. Diane Rondini-Harness of the State Public Defender's Office has tried to address the issue of students having no legal representation at expulsion hearings. Along with several colleagues, she helped form the Student Expulsion and Prevention Project.⁶⁴ While the project has no jurisdiction to represent students in expulsion hearings, it does teach volunteer attorneys how to do it, covering the nuts and bolts of expulsions, adolescent brain development, child interview techniques, and cultural awareness.⁶⁵

These are civil rights issues and economic issues. Students who leave school prematurely frequently are disengaged as citizens, lose earning capacity, become more dependent on public programs, and join the expensive prison population. Nobel laureate James Heckman of the American Bar Foundation has documented the benefits of high quality early childhood education as the most economical prevention of these ills.⁶⁶

While we work upstream to get to the root of so much inequality—the lack of equal educational opportunities—we must work with commensurate energy to address a troubling, persistent, and pernicious problem that continues to imperil the health of our justice system and our nation today: the justice gap.

<https://www.publicintegrity.org/2015/04/10/17074/state-state-look-students-referred-law-enforcement> [<https://perma.cc/FP4R-KQRC>].

62. *Id.*

63. ROBERT BALFANZ, SENT HOME AND PUT OFF-TRACK: THE ANTECEDENTS, DISPROPORTIONALITIES, AND CONSEQUENCES OF BEING SUSPENDED IN THE NINTH GRADE, <https://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/state-reports/sent-home-and-put-off-track-the-antecedents-disproportionalities-and-consequences-of-being-suspended-in-the-ninth-grade/balfanz-sent-home-ccrr-conf-2013.pdf> [<https://perma.cc/UJZ4-TRCW>].

64. Wisconsin State Bar, *Inside Track: State Public Defender Puts Pro Bono Grant to Work to Fight School-to-Prison Pipeline for Students Facing Expulsion in Madison Schools*, WISBAR.ORG (Feb. 18, 2015), <http://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=7&Issue=4&ArticleID=23889> [<https://perma.cc/HCF2-7PJF>].

65. *Id.*

66. JAMES J. HECKMAN, THE HECKMAN EQUATION, THERE'S MORE TO GAIN BY TAKING A COMPREHENSIVE APPROACH TO EARLY CHILDHOOD DEVELOPMENT 2 (2016).

Eighty percent of the poor and approximately fifty percent of people of moderate means do not have meaningful access to our civil justice system.⁶⁷

Chief Justice Gilbertson of North Dakota, President of the Conference of Chief Justices, informed the ABA House of Delegates in February that at least one party is self-represented in three-fourths of civil cases in the state courts of the United States.⁶⁸

Eighty percent of family court parties are self-represented.⁶⁹

According to your own Chief Judge Diane Wood, of the Seventh Circuit, over fifty percent of appeals in the Seventh Circuit Court of Appeals are filed pro se.⁷⁰

In landlord/tenant cases, ninety percent of landlords have lawyers, but only ten percent of tenants have lawyers.⁷¹

In the World Justice Project's 2015 Rule of Law Index, the United States ranks 21 out of 102 countries on accessibility and affordability of civil justice.⁷²

All of this when ninety-six million people qualified for LSC legal assistance in the most recent year of available census data.⁷³ And because of lack of funding, only half of those who seek help from legal services are able to be served.⁷⁴

Then there are those who have legal problems but never solicit a lawyer's help. Recent research at the American Bar Foundation by Rebecca Sandefur indicates that those on the lowest end of the socioeconomic and education scale often do not even recognize their legal problems as legal problems.⁷⁵ They simply look at their plight in life as one of a lack of success: "that's just who I am," "I have

67. Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263, 1265–66, 1266 n.7 (2016).

68. *Midyear Meeting 2016: President of the Conference of Chief Justices Addresses House of Delegates*, A.B.A. (Feb. 8, 2016), http://www.americanbar.org/news/abanews/aba-news-archives/2016/02/midyear_meeting_20161.html [https://perma.cc/9LKF-UDUM].

69. *Pro Se Statistics*, NAT'L ASS'N OF CT. MGMT., https://www.nacmnet.org/sites/default/files/04Greacen_ProSeStatisticsSummary.pdf [https://perma.cc/EJ9Y-NXFL] (last visited Feb. 13, 2017).

70. Chief Judge Diane Wood remarks to William C. Hubbard at American Assoc. of Law Schools meeting (Jan. 9, 2016).

71. Matthew Desmond, *Tipping the Scales in Housing Court*, N.Y. TIMES (Nov. 29, 2012), <http://www.nytimes.com/2012/11/30/opinion/tipping-the-scales-in-housing-court.html> [https://perma.cc/8NU7-A93L].

72. RULE OF LAW INDEX, WORLD JUSTICE PROJECT 30 (2015).

73. John G. Levi, *On Legal Services for the Poor*, BULLETIN AM. ACAD. ARTS & SCIS. 44 (2015).

74. Helaine M. Barnett, *Preface to DOCUMENTING THE JUSTICE GAP IN AMERICA*, LEGAL SERVICES CORPORATION (2009).

75. REBECCA L. SANDEFUR, *ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY 3* (2014).

unfortunate circumstances.” They do not recognize an eviction notice as a legal process perhaps providing certain opportunities for relief.

Lack of access to justice is a fundamental flaw in the fabric of our democracy. The current system is broken, and we must fix it. The traditional one-on-one model, where one lawyer works in person with one client at a time, simply has not met the demand. In law, we honor precedent, but sometimes we must break from precedent and tradition to seek more effective ways to establish justice. We are at an inflection point. We have a choice. We can continue to operate as we have and risk losing the very people we are sworn to serve, or we can engage in fresh thinking and fashion innovative ways to provide legal services to the public.

Fresh thinking is what the ABA set out to encourage with the creation of the Commission on the Future of Legal Services. The Commission is identifying and promoting innovations, through technology and other means, to create new avenues for access to justice, develop new career opportunities for current and future lawyers, and, at the same time, stay true to our core values of professional independence and client protection.

The Commission itself is an influential group of leading innovators, regulators, judges, law professors and deans, and practicing lawyers from all settings.⁷⁶

The Commission’s partners include the National Center for State Courts, the Federal Judicial Center, the Conference of Chief Justices, the Association of American Law Schools, and the Legal Services Corporation.⁷⁷ Through this collaboration among different perspectives, this effort is breaking down silos and trying to find new solutions to vexing problems.

Justice Brandeis, in *New State Ice Co. v. Liebmann*,⁷⁸ described how states are laboratories of economic, social, and legal reform.⁷⁹ No state has historically been more progressive and innovative than Wisconsin. Under Governor La Follette, state government looked to this great university to base policy and legislation on research, evidence, data, and facts. Imagine that! The so-called Wisconsin Idea⁸⁰

76. *Commission on the Future of Legal Services*, A.B.A., https://www.americanbar.org/groups/centers_commissions/commission-on-the-future-of-legal-services.html [perma.cc/KMZ8-BL3U] (last visited Feb. 16, 2017).

77. AM. BAR ASS’N, REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES (2016), <http://abafuturesreport.com/2016-fls-report-roster.pdf> [perma.cc/AJZ9-XBUX].

78. 285 U.S. 262 (1932) (Brandeis, J., dissenting).

79. *Id.* at 311.

80. One of the longest and deepest traditions surrounding the University of Wisconsin, the Wisconsin Idea signifies a general principle: that education should influence people’s lives beyond the boundaries of the classroom. Synonymous with

was a good idea then. It is a good idea now. We need to reinvigorate the Wisconsin Idea now, not just in Wisconsin, but in every state in our nation.

We need research and evidence to close the justice gap. We must find new delivery platforms based on evidence that meet the needs of the public. To do that, we must experiment.

That is why the ABA is helping to organize community-based, grassroots meetings throughout the country that include bar leadership, judiciary and court personnel, local practitioners, local businesses, clients, and innovators. Some of you have been a part of these exciting efforts, and virtually all of our grassroots meetings have had significant participation from the organized bar, the state judiciaries, and usually the state chief justices.

Last May, the ABA Commission on the Future of Legal Services and Stanford Law School hosted the National Summit on Innovation in Legal Services. The Summit more than fulfilled the purpose of cross-pollinating ideas and learning from one another.

The message was simple, and at the same time it was bracing. As we have seen in the medical profession, journalism, finance, real estate, and many other sectors, we must embrace innovation and technology or face the threat of becoming obsolete. We shop differently. We bank differently. We get our news differently. We cannot expect the public to look at the American legal system and not expect it to change if we are going to serve the public.

Lawyers can learn from innovators like Rich Barton, founder of several successful online companies like Expedia and Zillow.⁸¹ At the Stanford summit, he reminded us that technology can be a force multiplier. He urged lawyers to suit up and go to battle *with* the forces of change and innovation and to resist the temptation to fight them.⁸²

Speakers at the summit pointed out ways to open our minds to innovative approaches—using smart phones, tablets, new software, and even artificial intelligence—in order to identify new models for the delivery of legal services to those who do not have access to legal services.

Wisconsin for more than a century, this “Idea” has become the guiding philosophy of university outreach efforts in Wisconsin and throughout the world. *The Wisconsin Idea*, U. WIS.-MADISON, <http://www.wisc.edu/wisconsin-idea/> [perma.cc/T56N-EW85] (last visited Mar. 5, 2017).

81. Nick Wingfield, *The Art of ‘Something from Nothing,’* N.Y. TIMES (Apr. 13, 2014), https://www.nytimes.com/2014/04/14/technology/the-art-of-something-from-nothing.html?_r=0 [https://perma.cc/Z5RR-AMDX].

82. Victor Li, *Legal Innovation Summit Attendees Are Long on Ideas but Short in Data*, AM. BAR ASS’N J.: LAW SCRIBBLER (May 5, 2015, 1:50 PM), http://www.abajournal.com/lawscribbler/article/summit_attendees_struggle_with_a_lack_of_data [https://perma.cc/9XNU-XPV6].

Modria is a company which uses the online dispute-resolution systems developed by eBay and PayPal and resolves more than sixty million disputes a year—outside the traditional court system.⁸³

Avvo is another technology company that provides a variety of services.⁸⁴ It receives eight million hits on its website per month, and it has addressed 6.5 million legal inquiries.⁸⁵

IBM has invested billions of dollars in its Watson project, and recently it has invested another billion to commercialize IBM Watson in several sectors, including the legal sector.⁸⁶ A former IBM general counsel has said that Watson is going to take on work now done by external lawyers.⁸⁷

And state bars are getting more involved, such as the State Bar of Wisconsin which holds an annual contest called “That’s a Fine Idea! Legal Innovation Wisconsin,” a project that showcases the state’s legal innovators.⁸⁸ Over the years, it has highlighted original ideas from mobile clinics to eDiscovery apps.⁸⁹ I also applaud the bar’s support of Wisconsin’s Equal Justice Fund and the \$50 rule. And I commend the Wisconsin Supreme Court for establishing the Equal Justice Commission to look for innovative ways to provide greater access to justice.

We’ve learned from courts that use online kiosks to serve the public, from law schools that are teaching students to develop user-friendly online and smart-phone friendly legal forms, and from law firms with successful technology-based, nontraditional business models that serve more moderate-income clients and keep costs down and still make a profit.

The lawyers who seize these and other opportunities see what venture capitalists see. In 2012, investors pumped \$66 million into

83. THE MODRIA PLATFORM, MODRIA.COM, INC., [http://modria.com/product/\[https://perma.cc/F5QU-CQF8\]](http://modria.com/product/[https://perma.cc/F5QU-CQF8]) (last visited Feb. 12, 2017).

84. AVVO, <https://www.avvo.com/free-legal-advice> [https://perma.cc/DNM4-6RMZ] (last visited Feb. 12, 2017).

85. *Id.*

86. Steve Lohr, *IBM Is Counting on Its Bet on Watson, and Paying Big Money for It*, N.Y. TIMES (Oct. 17, 2016), <https://www.nytimes.com/2016/10/17/technology/ibm-is-counting-on-its-bet-on-watson-and-paying-big-money-for-it.html> [https://perma.cc/UA9V-2WT7].

87. Thomas H. Davenport, *Let’s Automate All the Lawyers?*, WALL ST. J. (Mar. 25, 2015, 12:18 PM), <http://blogs.wsj.com/cio/2015/03/25/lets-automate-all-the-lawyers/> [https://perma.cc/5TSE-W5RL].

88. *That’s a Fine Idea! Legal Innovation Wisconsin*, WIS. BAR ASS’N, <http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?volume=87&issue=4&articleid=11487> [https://perma.cc/4TW7-VX4D] (last visited Feb. 16, 2017).

89. *That’s a Fine Idea! Wisconsin Legal Innovators 2014*, WIS. BAR ASS’N, <http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?volume=87&issue=10&articleid=23652> [https://perma.cc/3K8L-EALZ] (last visited Feb. 16, 2017).

legal-technology companies that provide legal services.⁹⁰ These are not investments in law firms. They are investments in technology companies. In 2013, that number jumped to \$456 million, and in 2014, topped \$1 billion.⁹¹

Recent estimates conclude that there are over 600 technology companies providing legal services.⁹² The bench and bar have a responsibility to insure access to justice and to protect the public. But we must not be protectionist. The Supreme Court's decision in *North Carolina Board of Dental Examiners v. Federal Trade Commissioners*⁹³ makes that point. The ABA House of Delegates passed Resolution 105 at its February 2016 meeting to provide a regulatory framework for state supreme courts and regulatory bodies as they consider the regulation of non-lawyer or nontraditional legal service providers.⁹⁴ The framework is designed to protect the public while promoting greater and more affordable access to justice in new ways.

Disruptive innovations are accelerating in the legal sector. We know the world changes. As we survey the changing legal landscape, we are reminded of the lyrics sung by Carole King some years ago, "I feel the earth move under my feet."⁹⁵

The earth is moving under our feet, but we should not leave it to others to define what the new world will look like. We are at an inflection point. We cannot, to paraphrase Carole King, let the sky tumble down.⁹⁶ With the emergence of new technology-based legal service delivery companies, the window is closing on our ability to shape the future. Lawyers have what machines do not—judgment, wisdom, moral values, empathy. We are leaders. And it is our time, right now, to lead. Change can be difficult, but change is inevitable. In the words popularly attributed to Stephen Hawking, "Intelligence is the ability to adapt to change." Failing to seize this opportunity to be better stewards of the public interest is simply not an option. By partnering with innovators in design, engineering, and business, we can deliver our services to clients who are not now getting them and who may not even know we can help them.

90. *Id.*

91. *Id.*

92. See Robert Ambrogi, *Towards a More Accurate Listing of Legal Tech Startups*, LAW SITES (Apr. 28, 2016), <http://www.lawsitesblog.com/2016/04/towards-accurate-listing-legal-tech-startups.html> [https://perma.cc/LA5U-PX4F].

93. 135 S. Ct. 1101, 1117 (2015).

94. AM. BAR ASS'N HOUSE OF DELEGATES, ABA MODEL REGULATORY OBJECTIVES FOR THE PROVISION OF LEGAL SERVICES (2016).

95. CAROLE KING, *I Feel the Earth Move*, on CAROLE KING – TAPESTRY (Faber Music 1999).

96. *Id.*

Justice Scalia made the point so clearly when he said, “equal treatment is perhaps the most fundamental element of justice.”⁹⁷

“We the People of the United States, in Order to form a more perfect Union, establish Justice . . .”⁹⁸ You know these words. You know them by heart. We cannot establish justice when people do not have access to justice. Lack of access creates distrust in our system, and when trust in the justice system is broken, the rule of law is threatened. And when the rule of law is undermined and threatened, our very system of ordered liberty is at risk.

To maintain trust in our justice system, we must provide greater access to civil justice. We must also reform our criminal justice system. Just as we are at an inflection point in access to civil justice, we are at an inflection point in criminal justice. The United States has less than five percent of the world’s population and almost twenty-five percent of the persons incarcerated in the world.⁹⁹ In Wisconsin, the prison population has tripled from approximately 7,000 in 1990 to 22,000 in 2015.¹⁰⁰ We must reform our mandatory-minimum laws. We need to give judges the discretion that they need to make smart sentencing decisions.

Sentencing reform is happening in the states. I come from South Carolina, probably not known to all of you as a progressive state in these kinds of matters. But in 2010, we adopted a criminal justice and sentencing reform act.¹⁰¹ Let me highlight just a couple of the results.

Between 2010 and 2015, annual admissions to our corrections system decreased thirty-one percent.¹⁰² There has been a thirty-six percent decrease in the number of nonviolent offenders being

97. John G. Levi, *Chairman Levi: Statement on the Death of Justice Antonin Scalia*, LEGAL SERVS. CORP. (Feb. 14, 2016), <http://www.lsc.gov/media-center/press-releases/2016/chairman-levi-statement-death-justice-antonin-scalia> [<https://perma.cc/E2TY-3UCC>].

98. U.S. CONST. pmbl.

99. COMM. ON CAUSES OF HIGH RATES OF INCARCERATION, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 2 (Jeremy Travis et al. eds., 2014).

100. Gina Barton, *Secretive System Keeps Parole-Eligible Inmates Behind Bars*, MILWAUKEE J. SENTINEL (July 12, 2014), <http://archive.jsonline.com/watchdog/watchdogreports/secretive-system-keeps-parole-eligible-inmates-behind-bars-b99307603z1-266891491.html> [<https://perma.cc/5VEN-94XT>].

101. 2010 S.C. Acts 273.

102. S.C. SENTENCING REFORM OVERSIGHT COMM., STATE EXPENDITURES SAVINGS REPORT 3 (2015).

incarcerated.¹⁰³ Notably, admissions of violent offenders have decreased by ten percent in the same period, and the violent crime rate has also decreased.¹⁰⁴ Recidivism has declined,¹⁰⁵ and total state direct cost savings in the 2010–2015 time span were almost \$25 million.¹⁰⁶ That does not even account for the savings in capital costs that we've avoided by not having to build new prisons. Fewer people are in prison, the state is saving money, and the public is safer.

So sentencing reform works. The states are about it. We hope more states and the federal government can come along. There seems to be a broader coalition that is developing on sentencing reform, and this is the opportunity. Now is the time to get these reforms passed.

We must eliminate fines and fees as the primary source for funding local and municipal courts. That structure incentivizes police, prosecutors, and judges in the wrong way, and undermines public confidence in the courts.

We must provide greater support for indigent defense. Louisiana is facing a sixty-one percent budget cut to its already battered public defender program.¹⁰⁷ The National Association of Criminal Defense Lawyers pegs Wisconsin as having the lowest compensation rate in the nation for Sixth Amendment lawyers.¹⁰⁸

What happens when sentences are completed? The ABA has developed a new tool to encourage another needed criminal-justice reform, the first of its kind online inventory of the 47,000 state and federal collateral-sanctions laws that often deny employment opportunities, educational benefits, and even the right to vote for those who are released from prison. This database enables judges, counsel, researchers, and policymakers to identify and understand the vast scope of such collateral-consequences laws and their effects. This easily accessible information helps lawyers and judges better grasp the implications of plea agreements and sentences. It's a click away at abacollateralconsequences.org. You can go in and you can search state by state, and it has a full inventory of each state's collateral consequences sanctions.

My own state has about 715 collateral consequences sanctions. Wisconsin has 693 such laws. Louisiana has 1,483. In our federal statutes, there are a number of these laws that prohibit people from having an opportunity for a successful reentry into society. And sixty-

103. *Id.*

104. *Id.*

105. *Id.* at 4.

106. *Id.* at 6.

107. Letter from James T. Dixon, Jr., State Public Defender, to Cameron Henry, Chairman, House Committee on Appropriations (Dec. 2016).

108. SIXTH AMENDMENT CTR., JUSTICE SHORTCHANGED: ASSIGNED COUNSEL COMPENSATION IN WISCONSIN 2 (2015).

two percent of these laws keep people from getting gainful employment after they return to society, having paid their debt, the sentence to which they were sentenced.¹⁰⁹ *The Wall Street Journal* has focused on this project.

There is plenty of work to do—good work. Enough to keep us busy for a long time to meet the changing conditions that Judge Fairchild observed. We must press forward to protect the independence of the judiciary. We must press forward for equality in education, access to civil justice, and criminal justice reform. We must move with alacrity. We must move with creativity. As Albert Einstein said, “We cannot solve problems by using the same kind of thinking we used when we created them.”¹¹⁰

Several years ago, I had a meeting that was canceled, and I had a chance to take a run around the National Mall, and it was one of those picture-perfect days in Washington with a crystal blue sky. I got a little lost on my run, and I came in the back way to the Martin Luther King Memorial. I needed a rest. And so I took some time there, and I looked at that 450-foot granite wall that marks the monument. I observed the first quote, on the far left of the wall, and you are all familiar with it: “[T]he arc of the moral universe is long, but it bends towards justice.” The last quote—there are fifteen quotes, and the last one on the far right of the wall—quotes Dr. King’s words: “True peace is not merely the absence of tension; it is the presence of justice.”

Let us sear those words of Dr. King onto our hearts and into our minds. Let us observe the montage and hear the cacophony on the plaza of the Supreme Court when great issues are at stake.

Let us join together with new energy and new thinking and renewed dedication to deliver justice—not just for some, but for all.

Let us also walk to the quiet side, and think hard about the future of the legal profession and our justice system—listen and learn from one another—and act based on the best ideas. Let us be trumpeters and trombonists to the world so we can do two things—always these two things: promote equal justice under law, and advance justice, the guardian of liberty. Judge Fairchild would expect no less.

109. Joe Palazzolo, *For Americans Who Served Time, Landing a Job Proves Tricky*, WALL ST. J. (May 17, 2015, 6:00 PM), <https://www.wsj.com/articles/for-americans-who-served-time-landing-a-job-proves-tricky-1431900037> [<https://perma.cc/7QV7-B9TD>].

110. ‘We Can’t Solve Problems By Using The Same Kind Of Thinking We Used When We Created Them,’ BUS. INSIDER, <http://www.businessinsider.com/we-cant-solve-problems-by-using-the-same-kind-of-thinking-we-used-when-we-created-them-2012-4> [<https://perma.cc/QG7C-6ATU>] (last visited Feb. 24, 2017).