

# dean kearney's remarks on the wisconsin court system

*The following are Dean Joseph D. Kearney's remarks to the Western District of Wisconsin Bar Association in Madison on May 27, 2004. This was the keynote address at the Association's annual meeting. All the members of the Wisconsin Supreme Court were in attendance.*

**T**hank you. It is a privilege to speak to the Western District of Wisconsin Bar Association. I serve on the Board of Directors of the Eastern District of Wisconsin Bar Association. Our group is modeled on your organization and its successes. So I bring greetings not merely from Marquette Law School but also from the Eastern District of Wisconsin Bar Association, and I thank you for the leadership that this group has shown.

Among the things that I have learned since becoming dean a year ago is the usefulness of a flexible title for a speech. Last fall, at Justice Roggensack's invitation, Chief Justice Abrahamson buttonholed me concerning her then-upcoming visit to Marquette Law School as our annual E. Harold Hallows Lecturer. The Chief was interested in my views as to which of two topics she ought to address: one involving her experience as a circuit judge hearing small claims matters, or the other consisting of some reflections on the famous 1972 United States Supreme Court case of *Wisconsin v. Yoder*. I tried, as mildly as possible, to suggest to Chief Justice Abrahamson that she really ought to give whatever speech we were advertising, given that we already had sent out invitations with some title that she had given us. The Chief's response was something to the effect of, "Oh, I chose some vague but compelling title, which should have two advantages: it will help to attract some interest, and it will allow me to talk about whatever I want!"

I was rather skeptical, but I then found that the title was "An Uncommon Portion of Fortitude," which is a

phrase that the Chief borrowed from Alexander Hamilton, and when the Chief settled upon the small claims topic and gave a marvelous speech, you would have thought that the title had been exclusively designed for that speech. You would have thought that, of course, unless *either* you had been party to our conversation *or* you were familiar with the Chief's State of the Judiciary speech, delivered halfway between our conversation in early October and the Hallows Lecture in early November. That too turns out to have been entitled "An Uncommon Portion of Fortitude," and had nothing to do either with small claims court or with the *Yoder* case! I clearly had much to learn about entitling speeches.

I thought that I did a respectable job with my title for today's speech, "Some Observations on the Wisconsin Court System." True, it has nothing to do with the federal courts, and this is a federal bar association, but is it not the prerogative of the tenured academic to speak on whatever he or she wishes? The reference to my being tenured calls to mind a comment that my friend, Dean Ken Davis, made to me last summer when we were working on the Federal Nominating Commission for the Seventh Circuit vacancy that it now appears will be filled by Justice Sykes. When I made some remark concerning the political sensitivity of the matter between the Senators and the White House, Ken said, "Don't worry, Joe. You could be fired as dean tomorrow, but you're tenured in your good job. They'll still have to keep you on the faculty."

To the matter at hand: I have not made the study necessary to give some large-scale assessment of the Wisconsin courts. But I do have fairly extensive experience with the Wisconsin Supreme Court, and I have what strikes me as at least one important reflection that I wish to share. Before I do so, I should perhaps note that I have a somewhat unusual relationship with

the Court. In some instances, I am its appointee, as when I serve on its Board of Bar Examiners, currently as vice-chair. In other instances, I am an advocate before the Court, although like my predecessor Howard Eisenberg I do this in my capacity as a member of the Wisconsin bar (and through my p.o. box) and not through any affiliation with Marquette Law School. And in other instances still (and these are in my academic capacity), I am an independent observer and commentator concerning the Court. It is the third of these roles—that as an academic—that is my primary undertaking. It is, after all, what drew me to Wisconsin, and I would not have accepted the occasional case before the Court or even the position as Dean of Marquette Law School if I thought that either disabled me from reflecting on matters of public policy.

I think that it is important, by way of background to my specific observation, to recall very briefly the restructuring in the late 1970s of the Wisconsin appellate system. The intent in creating the Court of Appeals and in essentially eliminating mandatory review in the Wisconsin Supreme Court was not merely to lighten the workload of the Supreme Court. It was also (or even primarily) to preserve the ability of the Supreme Court to concentrate its energies on important cases posing substantial legal questions with implications for other cases or situations. In short, and to use phrases heard at the time, while the Wisconsin Court of Appeals was to be an *error-correcting* court, the Wisconsin Supreme Court was to be a *law-developing* court.

How has the enterprise gone, at the level of the Wisconsin Supreme Court? Two factors are especially important to any serious attempt to answer that question. One is the Court's inputs—the cases that it takes, in particular as measured against the cases it declines to take. The other is its outputs—its decisions.

The first matter is exceedingly difficult to measure. A few years ago I began to undertake a study reviewing each of the one thousand or so petitions for review that were filed in the Wisconsin Supreme Court in a particular year (this was 2001). The idea was to compare the cases that the Court accepted with those that it declined to hear. Just to review the petitions was quite an effort, and the vast bulk of the undertaking was conducted by one of my students, Maureen Lokrantz, who is now a lawyer here in Madison (and is present today). We got tremendous cooperation from the Wisconsin Supreme Court Clerk's office, both Cornelia Clark and her chief deputy at the time, Theresa Owens. Most of you would know Theresa (who also is here today) as the Clerk of the Western District of Wisconsin. Those of us who knew her at the Wisconsin Supreme Court have wondered whether it was not to escape this project of mine that she sought refuge in the federal courts. In any event, although I never formalized or published the results of the study, my lasting impression from this work was that the Wisconsin Supreme Court generally does a creditable job in selecting cases. There are from time to time exceptions to this rule, but I will stand by the general statement.

The question of the Court's outputs is more accessible. Here one need not go to the Clerk's Office to read them. Having accentuated the positive with regard to the Court's decisions of what cases to take, let me make a somewhat different observation concerning the Court's opinions—a constructive criticism, if you will.

[I]t is interesting to note that, between the [Wisconsin] Supreme Court and the Court of Appeals, the phrase "unique facts" has appeared in the appellate judicial decisions of this State far more times since 1977 than in the entire 130-some years previous.

Permit me to come to the point: Having read scores—indeed, hundreds—of Wisconsin Supreme Court opinions from the quarter-century since court reorganization, I have been struck and at times dismayed by what seems to me to be the Court's increasing tendency to say that it is limiting its decision to the allegedly unique facts in the case being decided. On the one hand, I am not quite certain what to make of these pronouncements. It seems to me that appellate courts almost necessarily announce (at least implicitly) principles of law when they decide cases. Thus, it remains available to litigants in future cases to argue that a Supreme Court decision that purported to speak only to the "unique facts" before the court in that case nonetheless, by logic or other principles of reasoning, is relevant to the new case. On the other hand, it should not come to this, and not only because of the costs that it imposes on future litigants.

Simply put, it is inconsistent with its role as a law-developing court for the Wisconsin Supreme Court frequently to announce that its decisions are limited to the unique facts of the cases in which they are made. Indeed, if this can be done, then perhaps it calls into question my praise a few moments ago, when I said that the Court generally seems to do a good job in sorting out the cases before it when accepting some petitions for review and denying others. More likely, such limitations *cannot* be announced consistently with basic principles of law, and the suggestion that a decision is limited to the unique facts of the case suggests that in that particular case the Court is interested in reaching a particular result but does not wish to embrace the implications of its decision for other, analogous cases. In all events, repeated statements to the effect that some or another judicial decision is (to borrow a phrase from Justice Roberts in a slightly different context) a "ticket good for this day and train only" suggest an unwise use of the scarce resources of a law-developing court.

This, too, is not entirely an impressionistic view on my part. Nor does it simply reflect some computer-based search for phrases such as "unique facts," although it is interesting to note that, between the Supreme Court and the Court of Appeals, the phrase "unique facts" has appeared in the appellate judicial decisions of this State far more times since 1977 than in the entire 130-some years previous. Even accepting that some of the uses of this phrase are in contexts that would not be germane to my basic point, that is some considerable prima facie evidence of the point. But I have not simply relied on that. I have conducted some reasonably substantial and broader research in the case law, and it supports my suggestion that the Wisconsin Supreme Court too often—and increasingly often in recent years—seeks to limit the effect of the opinion that it is announcing (or of some precedent) by stating that the decision is (or was) based on something unusual about the case. Of course, the criticism is especially strong with respect to cases where the Court states that there is something unique about the case before it but does not amplify adequately upon just what distinguishes the case from other fact situations that to many of us would appear to be analogous.

There is another whole area of unreason to limiting a decision to its unique facts. What, possibly, can the phrase (or similar phrases) mean? The facts of every case are unique. The way that a law-developing court undertakes its duty, I would have thought, is, in common-law fashion, by picking

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a case that seems to present issues that should be resolved and then deciding *that case*. When the next case comes along that differs in some respect, it is the advocate's role to persuade the court that the difference is (or should be seen as) material. It is possible that the real problem underlying the phenomenon that I am criticizing is a mistaken view that the Court should generally legislate (i.e., by deciding generally and "laying down" the law). This is not within the comparative advantage of courts. It is particularly difficult for a court which presides over a common-law body of law.

At bottom, the reason for the increasing frequency of the phenomenon that I have identified is difficult to assess. A relatively charitable possibility is that such limitations are prices that other Justices increasingly exact in exchange for joining an author's opinion. I do not know enough about the inner workings of the Court to determine the matter. All I can do, as a consumer of the Court's opinions in both my teaching and practicing capacities, is to make the observation and request that it be considered for whatever persuasive force it has.

Given these dual capacities, perhaps I would do well to make it clear that I am not engaged in special pleading. In the couple of cases that I have argued before the Court, the decision did not purport to be limited to some unique facts. In fact, one of the cases, a major products-liability case that I lost 5–2 in 2001, was a sweeping opinion on the substantive law of products liability. The opinion was so sweeping that it prompted an out-of-state legal academic to write an article (published in an out-of-state law review) entirely devoted to demonstrating the error that this commentator saw in the Wisconsin Supreme Court's opinion. In all seriousness, I mean this as praise of the Court's decision. Leaving aside my view of the merits, I must applaud the Court for having had the willingness to take the scarce resource of the lawyers' and the Justices' time invested in the case to write an opinion that will be useful to future litigants and courts in numerous cases and that is forthright enough with regard to the controlling principle of law that it enables others to assess and critique it.

I do not wish, by coming to Madison and making these remarks today, to create some impression that I am simply interested in criticizing others. Marquette Law School is itself interested in criticism. We ask rather constantly questions such as, "What do we do not so well, and how could we do it better?" We ask it not only of ourselves but of the bench and the practicing bar. And we get good suggestions. It is partly on the basis of these that several years ago we overhauled our entire legal writing program, now deploying full-time faculty to teach legal writing to our students. In fact, we have hired as three such faculty former law clerks to Justices Wilcox, Crooks, and Roggensack, and I am hoping to get some pointers from them because, although I have not prevailed in the cases that I have argued before the Wisconsin Supreme Court, I have managed to get votes from all the *other* members of the Court. (I number myself among the lawyers who have commanded a majority of the Court—just not in any single case!) In any event, I have no doubt that the current effort by my colleagues at Madison to examine their own legal writing program was, like ours of a few years ago, prompted by suggestions received from people such as you. Just as I feel free to make my observations, you should feel entitled, perhaps even obligated, whether you are a Marquette Law School alumnus or not, to pass along constructive suggestions or criticisms to me. I will welcome them—I answer my own phone and e-mail—and I thank you for the opportunity to appear before you today. •