

dean kearney's remarks to the fellows of the wisconsin bar foundation

The following are Dean Joseph D. Kearney's remarks to the Fellows of the Wisconsin Law Foundation on November 8, 2003. Dean Kearney's remarks were entitled "Some Reflections on the Law's Institutions."

I appreciate the invitation to share a few thoughts with you this evening. Without overrating them, I hope that some of my remarks may prompt some reflection and discussion—even debate.

Despite the description of my background in the introduction, I realize that it is primarily my new position as Dean of Marquette Law School that prompts the invitation. I have been heard to remark to my colleagues, when we disagree on a matter that is a close call, that ultimately a dean is appointed for his or her judgment. It is a self-serving statement, of course, but it happens to be true. For those of you who do not know me, permit me to offer an initial demonstration that I possess the good judgment for which one would hope in the leader of an institution.

Shortly after I agreed to speak, I inquired of one of your members how long my remarks should be. When it was suggested to me that 30 to 40 minutes would be an appropriate length, I had the sense to demur, to use the common-law term, and to respond that perhaps 10 to 15 minutes might be more appropriate. That, my friends, is judgment! I should note that my larger concern was not so much the differing instincts over the appropriate length of time for my remarks, but rather that it was originally thought that I would make them at the beginning of the evening—almost before the bar opened. I had no doubt that there would be a direct correlation between the perceived caliber of my remarks and not only their length but also the amount of elapsed time since the

first cocktail was served, and so I negotiated for this favored, after-dinner spot on the program. That, too, is judgment.

I must admit that I did not arrive arbitrarily at the idea of 10 to 15 minutes. This past spring, Tom Shriner, both a friend of mine and one of your members who is here tonight, invited me to give the Memorial Address at the Milwaukee Bar Association's annual remembrance of lawyers who have died within the preceding year. He did so on account of my friendship with the late Howard Eisenberg. After I wrote an initial draft of my remarks, I called up Tom and said, "The good news is that they're good. The bad news is that they're 20 to 25 minutes." Although we had not discussed an appropriate length prior to that, his reaction suggested to me, shall we say, that something along the lines of 10 minutes might be more appropriate. As, knowing Tom, you might imagine, it was a mild, understated, indirect, even subtle suggestion. It was only in the threat physically to remove me from the podium if I exceeded 10 minutes in the Memorial Address that I could find even the slightest hint that a longer period would be undesirable.

It was not merely the length of my original draft that prompted concern. Although I did not share the draft with Tom in advance, it was my comment that I might be "mildly provocative" that gave him pause as well. I ultimately determined not to be, and instead delivered remarks both suitable to that more somber occasion and upon which I wish to build tonight. As this gathering is for the living and not the deceased, I am sure that you will pardon me if this evening I dare to be somewhat provocative.

To build upon what I said in May requires that I recall briefly those earlier remarks. My essential

theme was the enduring importance, for the future of the legal profession, of the institutions that the lawyers whom we remembered that day had helped to build throughout their careers. I recalled Lord Coke's statement, derived from Chaucer and etched into the wall of the Harvard Law Library: "Out of the ould fields must spring and grow the new corne." I pointed out that the lives of those whom we remembered that day continue on in the new corne that the ould fields produce—or, less metaphorically, in the institutions that the lawyers before us had helped to establish, protect, and expand. I allowed (at about the 9 minute and 50 second mark) that receipt of these institutions was our inheritance as lawyers and that the tax we pay thereon is to fulfill the expectation of those who have gone before us that we will protect these institutions, develop these institutions, expand these institutions where appropriate, and bequeath them, thus protected, developed, and expanded, to the next generation.

So what are my additional reflections that I would ask you to consider this evening? They have to do with a danger to our institutions. In this respect, it is perhaps useful as an initial matter to observe that institutions have both purposes and cultures. In fact, it was initially suggested to me that I should speak this evening concerning the culture of the United States Supreme Court, where I had the opportunity to spend a year as a law clerk. Your representative and I agreed, on reflection, that there was little that I could say that would be both interesting and proper. But I can recall something about the culture of the Supreme Court before I continue with my specific point. Perhaps my most enduring memory of the Court's culture is the impressive sense of diligence and cooperation that seemed to pervade all of its various employees, including not only the Justices but also the administrative and support staff.

It is the diligence in particular that I remember: I was there in January 1996, when a massive blizzard dumped just under two feet of snow on Washington, D.C. The next day, the entire government was shut down. With one exception: the United States Supreme Court. The article in the *Washington Post* the next day was a classic: It began by observing that Chief Justice Rehnquist's determination to open the Court was attributable either to his Prussian sense of order or, more probably, to his Milwaukee boyhood. It also noted that seven of the nine Justices were on the bench when argument began promptly at 10 a.m. Ironically, one of the two missing was Justice David Souter, the New Hampshireite who had spurned the offer of a ride from the Supreme Court police and then could not navigate his vehicle through the streets to the Court. Finally rescued, he slipped into his seat, somewhat redfaced, around 10:15—the only time I recall a Justice's being late for argument. The other missing person was Justice Stevens, who was stranded—not in Chicago, but in Florida.

In any event, although that was partly a digression, it does serve to demonstrate my point that institutions have not only purposes, which we know, but also cultures. In some instances, the culture of the institution can itself lead to a danger.

The danger of which I shall speak is not of the sort that our institutions in this country used to face. One can get a sense of the past, long-ago-vanquished, threats to some of our institutions from a speech of Abraham Lincoln upon which I recently happened. It is a speech—sometimes called his Lyceum Address—that Lincoln delivered in

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Springfield in 1838, at the age of 28 (I observe the age for those who may think me young to be dean); its longer title is “The Perpetuation of Our Political Institutions.” The speech includes the following passage:

[T]here is, even now, something of ill-omen, amongst us. I mean the increasing disregard for law which pervades the country; the growing disposition to substitute the wild and furious passions, in lieu of the sober judgment of Courts; and the worse than savage mobs, for the executive ministers of justice. This disposition is awfully fearful in any community; and that it now exists in ours, though grating to our feelings to admit, it would be a violation of truth, and an insult to our intelligence, to deny. Accounts of outrages committed by mobs, form the every-day news of the times. They have pervaded the country, from New England to Louisiana;—they are neither peculiar to the eternal snows of the former, nor the burning suns of the latter;—they are not the creature of climate—neither are they confined to the slave-holding, or the non-slave-holding States. Alike, they spring up among the pleasure hunting masters of Southern slaves, and the order loving citizens of the land of steady habits.—Whatever, then, their cause may be, it is common to the whole country.

I think it not necessary to include the details that Lincoln then proceeded in this 1838 speech to recount. Of course, the phenomenon that he described became even more notable some 20-plus years later when it became necessary to resolve the question of slavery in the ultimate extra-institutional way: by civil war.

Today’s danger is different. It is true that we have controversies about which some in the society feel almost as strongly as many did about slavery in the nineteenth century. Yet even the most prominent example has not generated the same widespread literal call to arms. There is overwhelming common ground in our society that the means whereby substantial questions should be settled is by resort to American institutions, such as the press (and the forum that it provides for debate), the legislature, and the courts.

Over the last quarter-century or so, it has become common for professional organizations within the bar to seek directly to influence public policy, whether in the legislature by lobbying or in the courts in the part-lobbying/part-advocacy format that we call the *amicus curiae* brief. This has been known to be so even where the matter in controversy is scarcely some question touching upon bar or lawyering matters directly or even tangentially.

This is an overwhelmingly positive aspect of American society, and we should be proud of it. To be sure, we should be humble about it as well, as no one of us can claim substantial credit for the matter: it is, again to use words from Lincoln’s speech, “a legacy bequeathed us.” But it is nonetheless the case that we and our forbears embraced and built upon that legacy.

And yet, as I have suggested, our societal willingness to resort to our institutions—and not to trespass *vi et armis*, if you will permit a classical phrase that perhaps you recall from law school—occasionally raises a problem or danger. I wish to note it tonight. It is not unusual—and even though I think it is still the exception, it is increasingly common—to observe individuals seek to deploy whatever institutional means are available to them in the pursuit of their own individual ends. Nothing is so destructive of important institutions and thus ultimately of their usefulness for societal progress as their being seized for purposes for which they are ill-suited, even if we might think—indeed, even if we might all agree—that the purposes themselves are noble.

This is true even in the legal profession. Over the last quarter-century or so, it has become common for professional organizations within the bar to seek directly to influence public policy, whether in the legislature by lobbying or in the courts in the part-lobbying/part-advocacy format that we call the amicus curiae brief. This has been known to be so even where the matter in controversy is scarcely some question touching upon bar or lawyering matters directly or even tangentially. While I will decline to catalogue multiple instances of this trend, neither do I wish to be entirely oblique about the matter (which would not be my strength, anyway). Thus, I will say that the American Bar Association, as I see it, has done itself great damage by seeking to express a single viewpoint on a number of social policy matters in the last 25 or so years. The result has been to disinvite—or at least to make feel unwelcome—many lawyers who would otherwise have been eager to be part of the Association and to contribute to what they had supposed to be its essential purposes: legal education, service, and assistance. *Imagine how much less appropriate such activity would be for an involuntary bar association.*

Please do not mistake my point. I do not suggest that lawyers should not be involved in fundamental social, economic, or other political debates in this society. They should be. But they should be involved as individuals, as lawyers, and even as members of organizations, where those organizations have formed or appropriately evolved to permit or facilitate such involvement. I myself am a member of a number of organizations, but views that I might expect—even demand—one of them to advance I might be horrified to see another maintain. The capture of an organization and its use for purposes for which it was not intended are things with regard to which we should be vigilant.

I regret that a few may elect to regard my message as an ideological one. I cannot control the reaction, of course, but I can point out that it would mischaracterize what I have said. My point is entirely neutral with respect to ideology. One need look no further, as a counterpart to me, than to the example of my great friend and predecessor as dean, Howard Eisenberg. Howard was renowned for the amount of litigation, almost entirely pro bono, that he pursued. But Howard never did any of this in his capacity as Dean of the Marquette Law School. He did it as “Howard B. Eisenberg, Attorney-at-Law, Post Office Box 1476, Milwaukee, Wisconsin.” The reason is that Howard did not think that the institution of Marquette Law School existed as a vehicle for him to pursue litigation. The same is true in my case. To the reduced extent that I litigate, either on a pro bono basis or otherwise, I do so from my post office box. Indeed, when I represented Howard himself, in a case where he was amicus curiae in the Seventh Circuit in support of an octogenarian Holocaust survivor in a hopeless attempt to sue the Federal Republic of Germany (hopeless because of the Foreign Sovereign Immunities Act), we both appeared on the brief simply as attorneys. Litigation such as that is appropriate—perhaps even commendable, but that is another matter—for Attorney Eisenberg and Attorney Kearney. It would have been inappropriate for Dean Eisenberg or Professor Kearney.

I have many other reflections on the law's institutions, but I will content myself this evening with the foregoing. Each of us is, to a greater or lesser extent, a leader of one of the law's institutions. I merely suggest to you—and to myself—that it is our responsibility to ensure that each institution—whether it is a bar organization, a law school, or yet another—seeks to serve the purposes for which its members have banded together. •