

Speech to National Association of Women Judges

October 15, 2010

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It's terrific to be talking with this particular audience, though I wish you'd been around at the beginning of my career, when the talent pool for judges was largely confined to white males over fifty, many of them selected by white male politicians of equally limited vision. In fact, my very first court appearance, at the age of twenty-four, was before a federal judge who, at the height of his powers, was rated unqualified by the ABA and his local bar association, and whose chief qualification was closeness to the chairman of the Senate appropriations committee. By the time I got there, worse luck, his manifest ill temper was aggravated by his apparent senility. Not content with questioning my arguments, he threatened me with jail for continuing to make them. Thirty-nine years later, the trauma persists. So speaking to all of you today is not only an honor and a pleasure but, by comparison, the oratorical equivalent of the witness protection program.

I'm also grateful to be here because I wasn't exactly counting on this kind of attention at the beginning of my writing career, when the publication of my first novel rocketed me from unknown to obscure virtually overnight.

*The Lasko Tangent* was what one might call an instant rare book. My hardcover publisher printed 5,000 copies--many with thirty-five pages missing, creating somewhat more of a mystery than I'd intended--and I learned how easy it is to hide five thousand books from a populace of 250

million people. But when I asked my paperback publisher if we couldn't print a few more copies, she answered, "We're going to tease them a little." To which I responded, "Couldn't we at least try foreplay?"

She was not amused.

Then there was *Escape The Night*, in which I resolved to write some truly authoritative sex scenes, and the only one who noticed was my mom. This is true. My mom called up and, after some hesitance said, "Well, I really like your novel."

Detecting a certain tone of maternal reserve, I asked, "What's wrong, Mom?"

"Nothing, really," she replied. "It's just that I wondered why that couple"--referring to the male and female protagonists "--made love so much."

"Gee, Mom," I told her, "I didn't think they made love that much. To me, they're just a typical urban couple."

Well, she was so alarmed by that revelation that, for the next six months, whenever she'd ring me up she asked, "Is this a good time to call?"

And when I finally had a great success with *Degree of Guilt* I faced a new challenge: explaining to interviewers why a group perceived to be as untalented, unimaginative and unlikable as American lawyers was

drawing such an audience. There were a number of possible explanations, some of them truly unattractive. But I finally found the correct response:

“Can you imagine a television series entitled “The Young Accountants”?”

Anyhow, here I am--extraordinarily lucky, and extraordinarily grateful for it. It goes to show that if you just live long enough, anything can happen. And it surely proves that when F. Scott Fitzgerald said “there are no second acts in American lives,” he was dead wrong. So I’m all the more grateful that my work involves one of the most important ingredients of a civilized society: the written word--the work of disparate people from countless different backgrounds, which nonetheless illuminates our common humanity. For good writing helps us cross the artificial lines of race, gender, age, social class, sexuality and nationality, not only entertaining us, but enabling us to imagine a more compassionate self, and a kinder world. And to have contributed to that in any way, however small, is a privilege.

Which brings me to the theme of this year’s conference: “children, family, and the elderly.” With your indulgence, I’d like to speak more broadly about some challenges confronting all of us as citizens, as well as you as jurists. But I would be remiss not to mention what your invitation means to me.

When I graduated from law school in 1971, this assemblage would not have been possible. That you now represent such numbers is not only a dramatic increase in opportunity for women, but—like any expansion of civil rights—a tremendous benefit to our society. When the universe of prospective judges widens so dramatically, the judiciary not only becomes smarter, wiser and more empathic, but expresses to all citizens our society's commitment to its stated ideals.

But there is more. For me, as for countless other men my age, the arrival of the women's movement was a chance to have new colleagues and make new friends, with whom we could talk more openly about subjects as varied as work, family, sex, relationships, and the inevitable differences in perception and experience that make each of us who we are. It is now commonplace to say that women's liberation liberated men as well. But, for me, it not only changed my life, but the lives of my three sons and two daughters in ways they may never fully appreciate. And for that, as well, I'm truly grateful.

This is not to say that we've achieved Nirvana. It has not escaped my notice that more women than men take parental leave; that—regardless of career—more women than men bear primary responsibility for their children; that sexual stereotyping still exists; and that striking inequities in the workplace persist. Nor does our highest court seem to fully understand

this. Particularly startling was the recent Lily Ledbetter case, in which an Alabama woman sued for sex discrimination after discovering that her employer had paid her dramatically less than males with the same responsibilities, while concealing this fact from her for years. Nonetheless, a majority of the U.S. Supreme Court—all male, by the way—ruled that she could not maintain this suit because she had not brought it in a timely fashion, even though she brought it promptly after learning of her employer’s concealment.

Think about that. Stripped of legal niceties, the Supreme Court rewarded an employer for successfully deceiving a female employee about the rankest kind of discrimination, destroying her right of redress in the process. That is not law—it is ideology, inflicted by activist judges bent on fulfilling the mission for which they were nominated. And as long as business can practice such discrimination against women, and our highest court protects them, there still is work to do.

I’ll have more to say about the Supreme Court and special role of the judiciary. But decisions like Ledbetter reflect a broader crisis in society that should concern us all—regardless of party, political ideology, or legal philosophy. And that is the coarsening of our public dialogue which isolates groups of citizens from each other, shriveling our empathy, imagination and sense of common purpose, while reducing our institutions

to instruments of partisan warfare, bent on promoting chosen interests at the expense of others. For there is simply no escaping the mindless divisiveness of contemporary American politics; the insidious role of a mass media that prefers power over truth; and the domination of our campaigns by a marketing mentality so soulless that it invites contempt and disbelief.

These themes hardly exhaust our problems. There are so many it is hard to choose among them. Those which leap most easily to mind include the threat of terrorism; our sometimes misguided response; a fiscal crisis where we have parked our debt in China; and the growing educational and financial gulf among our citizens in the face of economic decline. But running through each of these problems is the cynicism of modern politics, which turns Americans against each other and erodes a common commitment to the common good.

Whatever my personal beliefs, I'm appalled by partisanship run amok, where politics means prejudice, and policy yields to glibness and dishonesty. Historically, our president and other elected officials won elections by seeking consensus, and enlisting the support of those in the political center. But too often our modern political strategists follow a very different model: turn out supporters with a fixed point of view, demonize those fellow citizens who support the other side, and persuade those in the

middle through negative campaigning that our electoral system is way too toxic to care about. One striking example is the shabby pseudo-patriotism that stemmed from 9/11, where politicians recklessly villainized those who disagreed with them as soft on terror, sending the not-so-subliminal message “vote for us or die.” This degraded public dialog has created a politics of bitterness—where news outlets exist to perpetuate prejudice, not enlightenment, and where political leaders do not engage opposing ideas, but villainize those who voice them.

In this new politics of disparagement, division, and distrust, the exploitation of cultural differences and social anxiety has become a surrogate for addressing the very real problems Americans face in common. Never mind that much of this divide is based on a parody of one side or the other, and that truth and fairness is not the exclusive property of either. In the echo chamber of modern media, far too many candidates and commentators have figured out that if they can appeal to our fears by repeating the same lies and exaggerations until they become accepted truth, they will never have to seriously address the wealth gap, the health gap, the loss of jobs, the failure of our schools, the decline of opportunity and the dawn of a new Gilded Age where a wealthy few increasingly enjoy privileges reminiscent of the late Nineteenth Century. Through this grotesque over-simplification of American society, millions of Americans

have been a political lab experiment, and discussion of a coherent public policy which addresses the common good has been replaced by a nation filled with people who—increasingly—see the other as the enemy of the America they imagine. Equally damaging, our civic debate is infected with lies, deceptions, and half-truths, ignoring Senator Moynihan’s famous comment that “we’re entitled to our own opinions, but not our own facts.” This witch’s brew of ignorance, fraudulence, and anger can destroy our society as effectively as any foreign enemy.

Then there is the almost equally degrading handmaiden of this decline in our public life: the exploitation of false or irrelevant charges—often about private conduct—to destroy public careers. The current tendency to cheapen our public discourse with personal attacks will, like the slow dripping of water on a stone, erode our collective sense of decency and compassion, even as it deprives us of men and women of good public character. Martin Luther King was an adulterer, and he made our country far better than it was.

A glance at our news outlets reveals how corporate media seek to profit from these phenomena. Increasingly, our purveyors of news occupy niches, in which the written and spoken word is meant to confirm our settled biases, persuading us that politicians or media with a different point of view are peopled by degenerates, charlatans and liars. For a society

which is bombarded with so much news, too little of it encourages empathy for people and problems outside our own direct experience, or any interest in ideas other than those that keep us from entertaining new ones. A look at the *New York Times* bestseller list for non-fiction confirms this: on any given week, the most successful books about our politics are the literary equivalent of a food fight, waged by propagandists who profit by spattering their targets with calumny intended to foreclose thought, not promote thought. And so our society, like the majority in Ledbetter, increasingly lives in gated communities of the mind.

We cannot afford this any longer. We face a time of national peril unique in our history—including a gradual erosion of security for ordinary Americans which could, over time, spell the end of the expanding opportunity which was the hallmark of twentieth-century America. We have done better before, and can again. But to do so, we must rise above this cacophony of meanness, and regard each other with compassion, good will, and the humility to know that all of us have so much more to know about each other.

But, in doing so, we face another barrier to an effective and functioning democracy. Sadly, the way we finance our political campaigns is little better than an elegant form of bribery, in which all citizens' votes are supposed to count equally, but some citizens' voices are much louder

than others. It is bad enough that our candidates are forced to spend countless hours raising money, or courting lobbyists who can raise it in bundles, giving them a place at the table when laws are drafted and policies are set. Worse, and thanks again to the same majority on the Supreme Court, corporations are now deemed to have the same rights as citizens under the First Amendment, enabling them to spend millions in undisclosed dollars to promote political causes, often through grossly deceptive advertising. In a blatant act of judicial activism, the Court in Citizens United reached beyond the holding of that case or any prior precedent, striking down campaign reform laws passed to limit the unchecked influence of special interests. The court's ruling ignores what is obvious to anyone familiar with life in Washington or any state capital: that money not only buys access, but all too often buys outcomes that change all of our daily lives. And, in the process, the majority exploded the pretense of judicial modesty through which they conceal their mission—that they defer to the legislature, and decide only the case before them, serving merely as umpires who “call balls and strikes.” Even George Orwell would be impressed.

To some of you, this may sound harsh. Perhaps you even suspect the truth—that I'm no conservative, at least as many on the right currently define that term. On this count I readily confess to a certain bemusement

when some of our current justices claim fidelity to the “original intent” of framers who denied the franchise to women; who included men who—whatever their manifest virtues—owned and sometimes slept with their slaves; and who collectively would have been perplexed by the very thought of this assemblage. To me, one might as well assume that all scientific thought stopped before Newton, Darwin and Einstein—or, assert that Edmund Burke, the great conservative thinker who believed in organic change, is unfit to read. I sometimes suspect that deploying “framers’ intent” is just another way for judges to inflict their own biases. In 1954, for example, it would have been all too easy to ignore the mass of contemporary sociological data showing the damage done by segregated schools, simply by suggesting that the decision in Brown v. Board of Education was never contemplated by Thomas Jefferson. But I’ll try to allay any partisan concerns by citing a man who, to me, is the quintessence of a bad judge: the liberal icon William O. Douglas.

Like the most recent nominees, Douglas was well-qualified by intellect and experience to serve on our highest court. But he was also a man on a mission, bent on pursuing his core political and social views, at whatever cost to the law or the credibility of the court. As a law student, I was shocked to read opinions so blatant in their contempt for law itself,

and so obviously driven by the result Douglas wanted from the outset. Not until the last decade have I seen their like so often.

When the Supreme Court becomes an agent of the most partisan forces in our politics, and justices are nominated to carry out their agenda—after whatever coy disclaimers they may utter before the Judiciary Committee—it erodes the credibility of all courts. It is one thing to have a judicial philosophy that guides a judge’s appraisal of the law. But when a closed mind and a rigid ideology are prerequisites for appointment to our highest court, something precious is lost. Yet more and more of our judicial aspirants advance their prospects by aligning with groups, like the Federalist Society, that believe that our legal system is just another instrument for imposing their political and ideological beliefs on their fellow citizens. It is not for nothing that the media now covers the decisions of federal judges by routinely noting the president who appointed them. And God help us when the spirit of Citizens United infects the election of state judges, as it already has in some instances, allowing corporations to advertise in support or opposition to jurists who pass on their cases.

I realize that this is not a “feel good” speech. But I offer this critique because I feel good about you—the crucial role you play in this society, the credibility you retain, and your commitment to preserving a legal system that is free from politics and passion. Many countries are, or purport to be,

democracies; very few have a judiciary as pivotal and principled as ours. Through your example, your advocacy, and your dedication to the rule of law, it falls to you to preserve that. And then, whatever else, this special institution—our American judiciary—will inspire and protect the next generation of men and women alike.

Thank you.