

Public Trust as a Dimension of Equal Justice: Some Suggestions to Increase Public Trust

Remarks of Sandra Day O'Connor

Work in a building which bears a marble inscription over the entrance that says, "Equal Justice Under Law." The subject of this conference shows an admirable awareness of the importance of public trust as a dimension of equal justice.

This is the first national conference on this subject, and it is very impressive that so many state chief justices and state court administrators are here. Also impressive is the imposing array of national court organizations, the American Bar Association, state bar associations, representatives of the federal judiciary, the League of Women Voters, the National Association of Women Judges and the many private citizens and citizen groups who are present here today. It is a most worthy and appropriate conference.

You know, as courts and as judges in courts, we do care first and foremost about how we serve the public. And our report cards in the last analysis come from the public that we serve. And nothing could be more important than to step back now and then and look at that. Sometimes in the pressure of doing what judges have to do and running a tight ship in the courtroom and deciding tough issues, we might forget that, in the last analysis, it is, after all, the public we serve and that we do care how the courts are perceived generally.

And when he invited me to speak today, Chief Justice Tom Zlaket [of Arizona] made it clear that he and his fellow chief justices are not here just to learn more about how we can build public trust in the justice system, but to become catalysts for action on the sub-

ject. And the measure of this conference will be what happens when you return home, what you do about the conclusions and ideas discussed here.

The 1999 national survey taken by the National Center for State Courts provides a fascinating glimpse into public attitudes about state courts. Together



with the earlier survey conducted by the American Bar Association, the surveys reveal a fairly high level of public confidence in our courts. There is a widely held belief that, although not perfect, our justice system is one of the best in the world, and public confidence in our system has increased over the last twenty years, even as confidence in

other public institutions has declined. Slightly over half of those surveyed had been called for jury service at some time in their lives. The American Bar Association survey reveals strong public support for the use of juries. But the surveys also showed substantial dissatisfaction in some areas and many opportunities for increasing public confidence and trust in the justice system.

You have explored public attitudes and examined your own experiences in the justice system. You have identified a number of critical issues. I have not had the opportunity to be with you for your discussions, and I will mention only a few areas relating to my own longtime concerns. And my failure to mention other issues that you may have discussed and zeroed in on is by no means an indication that I consider them unworthy of attention.

Now, among the ideas that have been discussed here and which will undoubtedly be part of your national action plan is the need to strengthen juvenile and family courts. As a former judge of the Superior Court in Maricopa County, Arizona, I have had the experience of dealing with family issues. Courts that hear family and juvenile cases touch the lives of many people, and they are often called upon to help mend social bonds and to try to keep the social fabric of the community intact. As the involvement of courts in the area of family and juvenile justice continues to grow with our population, it is likely that public perception of courts will be increasingly influenced by how well these family and juvenile courts function.

The public opinion survey conducted by the National Center for State Courts demonstrates that much improvement is needed in this area. The survey reported that a majority of Americans believe that court handling of family and juvenile cases is merely fair or poor. Only one-third of the public rates the courts as doing either an excellent or good job with juvenile cases. This rating was lower than that for the court handling of civil and criminal cases in general, and it indicates that there is considerable work to be done in the juvenile and family areas.

The low public confidence in these courts reflects in part the difficulty of the tasks these courts face. Family cases present special challenges for judges because the role of the judge in such cases is substantially different than in the run-of-the-mill civil and criminal case. Juvenile judges by necessity become more involved in practical problem solving. They may identify crucial needs for social services.

In child abuse cases, the courts try to provide a protective shield for children and are often called upon to make decisions that fall outside the normal scope of legal training and experience. Juvenile courts require specially skilled and often more expensive staff support to assist the judges handling these non-traditional roles. Consequently, the juvenile judge may spend considerable time overseeing the court staff, doing administrative duties.

Family and juvenile court judges function in a forum that's charged with human emotions. The only time I ever experienced danger in a courtroom was when I sat in a family matter involving the breakup of a marriage and a custody problem. Judges are called upon to make decisions that profoundly affect families. And perhaps nothing is more difficult than terminating parental rights. The emotional trauma of the family court is often exacerbated when litigants choose to represent themselves, as they do more and more often these days.

Indeed, judges working in this area have to operate in what is increasingly becoming a lawyerless environment. The situation is sometimes further complicated by linguistic problems. I don't know what all of you have seen, but certainly in my home county in Arizona,

there was a large Spanish-speaking population, and sometimes just communication within the court was more difficult.

Another reason that public perception concerning the handling of juvenile cases is negative may be related to the next point I'm going to make in a few minutes, that there is a rather widespread belief that African-Americans are not treated as fairly as other groups. The statistics of the racial characteristics of juvenile offenders reflect that substantially more African-American young people are charged with delinquency or crime than their numbers in the general population would indicate. The reasons for the disparity need to be examined, and the process of the courts must be made as fair and as evenhanded as we can possibly make it.

The performance of family and juvenile courts is vitally important to society and, of course, to the individuals caught up in a disintegrating family situation. In the planning that follows this conference, I personally hope that a high priority will be given to this area and that judges, law schools, judicial educators and judicial planners will give family and juvenile justice the attention it deserves.

My second point deals with racial bias and court-community relations. And I think this is an issue that should be of concern to all of us, the belief that African-Americans have that our system of justice does not serve them well or well enough. The results of the public opinion survey for this conference illustrate the magnitude of this problem. Two-thirds of the African-Americans surveyed believe that courts are out of touch with the community and that African-Americans are treated somewhat or far worse than other racial groups. Moreover, the survey indicates that members of other racial groups agree that African-Americans are treated less fairly by the courts than other groups. Clearly, this is a problem that has to be addressed.

As we near the end of the Twentieth Century, I think we can look back and say we have made great strides towards the racial integration of our society and the pursuit of gender equality and the protection of fundamental rights and freedoms. But legal change is not always enough. The perception that African-Americans are not afforded equality

before the law is pervasive, and it requires us to take action at every level of our legal system, especially at the local level.

The nature of such action will be determined by you and your colleagues. The fact that a conference such as this is taking place indicates that courts are interested in establishing closer relations and better communications with the minority communities that they serve. But concrete action must be taken to insure that court services do not operate in ways that perpetuate racial or gender bias.

The problem of perceptions is not confined to the African-American community. The pre-conference survey reveals that a majority of Hispanic-Americans and forty percent of Caucasians also feel that courts are out of touch with the community.

There are, of course, ethical and prudential limitations on the extent of interaction of judges with the public, but these constraints on judges may permit a more active role for judges in the community than has been the case in the past. As a result of this conference, I hope that states will begin to explore the permissible scope of court-community relations and examine the various ways in which these relations can be strengthened.

Now, another point: juries. The survey revealed that close to twenty-five percent of those surveyed had been called for jury service. The American Bar Association's survey showed almost seventy percent of those surveyed consider the jury the most important component of the justice system. Most people who actually visit the courts do so when they are called for jury service. Juries usually do their job very well. On occasion they show extraordinary courage in delivering a verdict. But, at times, they can also disappoint us. One of this country's great observers of human nature, Mark Twain, once complained that juries had become "the most ingenious and infallible agency for defeating justice that human wisdom could contrive."

But we are going to continue to rely on juries in this country. Our federal Constitution and all of its state counterparts guarantee the right to trial by jury. It is fundamental to our system of justice. But there are serious problems with

our handling of juries today in many jurisdictions. Solving these problems can be assured if every state will consider some needed changes. Some states have already done so. My home state of Arizona has had a jury project successfully completed, and I think New York State, with Judith Kaye's help, has done the same. And others may be in process.

There are three aspects that I think need particular attention. First, the conditions of jury service. When citizens are called for jury service, they often view it as a burden rather than a privilege. Indeed, some don't show up at all, I'm told. And for good reason: when they arrive at the courthouse, they are fre-

quently treated more like sheep than people, and the system can seem designed to disrupt their lives to the maximum possible degree.



quently treated more like sheep than people, and the system can seem designed to disrupt their lives to the maximum possible degree. . . .

tions or to participate in any way. And at the end of the case, they are finally read a virtually incomprehensible set of instructions and sent into the jury room to reach a verdict in a case they may not understand much better than they did before the trial began.

The jury system is not only central to our trial process, but it is the primary link between the courts and the community. If public attitudes are going to be of concern to us, they certainly are affected by how jurors perceive the system. The impressions jurors receive during their jury service can have a significant impact on public perception about the justice system.

At the very least, every state should reexamine and perhaps narrow the use of peremptory challenges in which jurors are excused with no reason given. . . . Widespread use and abuse of peremptory challenges, I think, has contributed to the impression that some have of unrepresentative juries.

quently treated more like sheep than people, and the system can seem designed to disrupt their lives to the maximum possible degree.

Second is jury selection. The process of selecting a jury from the citizens called for jury service on a particular day has changed somewhat from a necessary safeguard against potentially biased jurors to a way, in many cases, for highly paid jury consultants to attempt to insure a jury favorable to the side paying their fees. And I think this is something that has to concern us with the jury system.

Third, the conduct of the trial itself. Too often, jurors are allowed to do nothing but listen passively to the testimony, without any idea of what the legal issues in the case are because they aren't told at the beginning of the case. They are not allowed to take notes in many jurisdic-

In Arizona, as I said, there have been a series of reforms to increase juror participation at trial and to increase the understanding and respect that citizens have for the system. The time jurors spend in jury service is perhaps our best opportunity to instill in them a sense of trust in the fairness and the competence of the justice system. For this reason, I urge every participating state to examine or re-examine the jury system in the state and to make any necessary changes to make them representative and more effective than has been the case in the past.

At the very least, every state should reexamine and perhaps narrow the use of peremptory challenges in which jurors are excused with no reason given. Widespread use and abuse of peremptory challenges, I think, has contributed to

the impression that some have of unrepresentative juries. It has also given rise to so-called "scientific" jury selection which some say can be used to assure a particular verdict. Moreover, the use of unlimited "for cause" challenges to prospective jurors, coupled with extensive media coverage of some cases, leads some courts to search for the most ignorant and poorly informed citizens to serve as jurors in high profile cases because only those citizens are likely to have avoided forming any opinions.

With respect to jurors selected for service, they ought to be given a clear and understandable set of instructions on the law at the beginning of the case as well as at the end. They should be allowed to take notes, to let the judge know of questions they would like asked of witnesses. And some few states now permit the jurors to discuss aspects of the case before they are sent for final deliberations with each other. All these issues and more should be considered.

Finally, access to justice. The survey data developed for this conference also show that a great majority of people do not think justice is affordable, and they attribute this, in large part, to the cost of legal services. It also shows, perhaps not surprisingly, that confidence in the courts increases with income levels.

The Sixth Amendment to the United States Constitution guarantees the accused the right to assistance of counsel for his defense. The Supreme Court has held that this right includes the right to counsel without cost for all indigent defendants in danger of losing their liberty and on their first appeal of right. Congress has now enacted a statute that provides for the appointment of counsel to represent an indigent criminal capital defendant in federal post-conviction proceedings. The clarification and expansion of the constitutional right to legal representation in criminal cases has produced systems to provide counsel to indigent criminal defendants.

But these systems have not always proven to be sufficient. There has been increasing recognition that in capital cases, in particular, the availability and quality of representation is sometimes inadequate. Recognizing these shortcomings, some states have begun taking steps to improve the level of representation in death penalty cases.

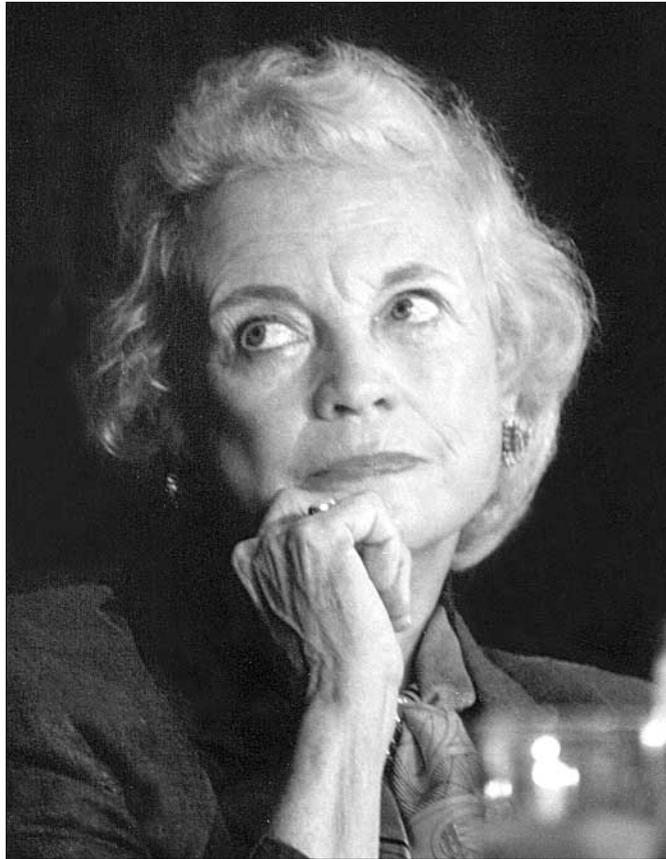
Congress recently sought to speed up this process when it enacted the Antiterrorism and Effective Death Penalty Act in 1996. Congress required that states provide a mechanism for the appointment, compensation and payment of reasonable litigation expenses of competent counsel in state post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal in the state or have otherwise become final for state law purposes before they may take advantage of new time limits on the filing of federal habeas petitions by capital defendants. This new law, it is hoped, will provide an impetus to the provision of adequate representation to all indigent capital defendants. But the law has no effect, this new law passed by Congress, absent action on the part of states to carry out its provisions in a fair and a faithful manner. And, of course, it addresses but one small part of the broader problem of inadequate counsel for the poor.

The problem of adequate representation for the poor is not, of course, limited to criminal proceedings. Similar problems plague civil proceedings, as well. The economics of modern law practice excludes many people and small businesses from trying to seek civil justice through the courts. Many of the solutions developed for representation of indigent criminal defendants are not practical or appropriate in civil cases, but in our efforts to address the problems of inadequate representation we mustn't forget that there also is a pressing need to provide access to representation in civil cases to those who can't afford it.

In large part, because of the expense and difficulty of obtaining adequate representation, more people are resorting to self-representation in courts. This can be risky for the litigants, who often aren't properly prepared to present their legal claims. It can be burdensome for the courts, which are forced to make decisions in poorly argued and presented cases. As you have learned, some com-

munities are developing computer-aided assistance to pro se litigants in selected areas. Staffing in some jurisdictions is being provided to help people take advantage of these new processes.

These efforts are laudable, and I think we should experiment with an array of such programs. At the same time, we have to continue to encourage alternative dispute resolution at early stages of cases to resolve them before they reach the courtroom. Although the pre-conference survey did not address public levels of



satisfaction with alternatives to courtroom litigation, previous surveys have shown significantly greater satisfaction when a dispute is mediated or negotiated as a means of resolving it [rather] than taking it to a court.

The conference has identified many possible ways in which you can work to broaden citizens' understanding and trust of the justice system. And such understanding and trust is essential to our system of government. It's a government of the people, and we want the people to understand and to care.

As judges, court administrators and attorneys, we all rely on public confidence and trust to give the courts' deci-

sions their force. We don't have standing armies to enforce opinions, we rely on the confidence of the public in the correctness of those decisions. That's why we have to be aware of public opinions and of attitudes toward our system of justice, and it is why we must try to keep and build that trust. We can do it by working to create a just society. The justice system must provide for the fair, prompt and proper resolution of the conflicts brought to it, and it must also work to help the public see what the system is doing and how it is being done.

You have taken a first step toward that goal by holding this meeting. And it is my hope that this conference has given you some ideas for actions you can take when you go home to put the goals of this conference into effect and make it the landmark event that its organizers hoped it would be. I wish you every success in your efforts on behalf of all of us.

Sandra Day O'Connor became the first woman to serve on the United States Supreme Court when she was appointed by President Reagan in 1981. She had her own law practice for a time in Arizona before she began a career in government service. Justice O'Connor served in all three branches of government in the State of Arizona, where she won three elections to the State Senate, serving as majority leader for two years; served as an Assistant Attorney General; and served as a judge, first on the Maricopa County Superior Court and then on the Arizona Court of Appeals.