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TRIBUTE

Civility, Dignity, Respect, and Virtue

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Just over a decade ago, in his characteristically eloquent remarks at a clerk reunion in the Great Hall of the Supreme Court, Justice Kennedy reflected on the phrase "pursuit of Happiness" in the Declaration of Independence.[1] The Justice observed that Thomas Jefferson did not have in mind the phrase's modern, colloquial meaning—the ephemeral happiness that follows enjoying a delicious meal or wonderful play, traveling to a new or exotic locale, or acquiring the latest gadget. What Jefferson instead meant was the happiness that comes from fulfilling one's duty to promote civic virtue and advance the public good. Jefferson believed, as did his contemporaries, that fulfilling that duty yields the greatest happiness of which we are capable.[2]

It was altogether fitting to hear Justice Kennedy reflect on Jefferson's words, for we who were privileged to clerk for him witnessed firsthand how he embodies happiness in its deepest, most fundamental sense. My year with the Justice (and an earlier year with the exceptional Judge Joel Flaum of the Seventh Circuit) inspired me to try to become a judge myself, and when I was given that opportunity, his example, in both word and deed, taught me how to fulfill the duties of a public official. It is to honor always the rule of law; to listen with an open mind and heart to those with whom we disagree; and to treat all people with the dignity, respect, and compassion they deserve as human beings.

The Justice steadfastly practiced those virtues. I am unaware of his directing, either during my clerkship year or ever, a cross or intemperate word toward any colleague, even on occasions—of which there were many, among

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1. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.").
2. *See, e.g.*, Carol V. Hamilton, *Why Did Jefferson Change "Property" to the "Pursuit of Happiness"?*, HIST. NEWS NETWORK (Jan. 27, 2008), https://perma.cc/Q5DF-YFGZ.

the more recent being a pungent comparison of his opinion to the fortune in a fortune cookie[3]—when a lesser mortal would have succumbed and issued a sharp and richly deserved retort. His fundamental decency would not contemplate, let alone allow, it. Nor would his innate and undeniably correct sense of how collective decision-making institutions—be they courts, boards, juries, legislatures, or electorates—must comport themselves if they have any hope of serving their intended functions. How can we solve our most difficult problems, let alone survive as a peaceable and democratic society, if we speak to one another with such disrespect, invective, and bile? How can we ensure that all citizens know that they have been heard and valued, when only one side can prevail, if we retreat into our own silos with the assurance that our opponents are members of a different tribe who are not just wrong, but ill-intentioned and illegitimate?

Think back to *Obergefell v. Hodges*,[4] in which Justice Kennedy authored the Court's opinion holding that the Constitution affords same-sex couples the right to marry. The opinion left no doubt that the Justice felt quite strongly that the correct result had been reached. Yet he recognized that many would strongly disagree, and took pains to urge that their views be accorded respect and "proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths," so that the two sides "may engage those who disagree with their view in an open and searching debate."[5]

Fast forward to this term's *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,[6] which addressed a First Amendment challenge to a state commission ruling that Jack Phillips, a baker with religious objections to same-sex marriage, violated state antidiscrimination law by refusing to bake a wedding cake for a same-sex couple. In his opinion for the Court, Justice Kennedy recognized that states of course may enact laws that protect gay people from discrimination.[7] Yet the Justice also recognized that "Phillips was entitled to the neutral and respectful consideration of his claims" from the commission.[8] Given comments from a commission member that "disparage[d]" Phillips's religion "by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere," Justice Kennedy

3. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2630 n.22 (2015) (Scalia, J., dissenting) ("If, even as the price to be paid for a fifth vote, I ever joined an opinion for the Court that began: 'The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity,' I would hide my head in a bag. The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie.").
4. 135 S. Ct. 2584.
5. *Id.* at 2607.
6. 138 S. Ct. 1719 (2018).
7. *Id.* at 1727-29.
8. *Id.* at 1729.

found that the commission violated the Constitution.[9] And echoing his exhortation in *Obergefell*, one that in his view had not been met, the Justice closed with an admonition, or at least a hope, as to how similar disputes should be handled in the future:

> The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services on the open market.[10]

Given the paramount importance of civil and open-minded discourse in Justice Kennedy's worldview, it is no surprise that he was the Court's foremost proponent of the jury system and principal force behind precedents designed to ensure that juries are selected and operate in a bias-free manner. In *Peña-Rodriguez v. Colorado*,[11] which carved out an exception to the no-impeachment rule for compelling evidence that a juror's vote to convict was significantly motivated by racial animus, Justice Kennedy's opinion for the Court offered this description of the jury: "Like all human institutions, the jury system has its flaws, yet experience shows that fair and impartial verdicts can be reached if the jury follows the court's instructions and undertakes deliberations that are honest, candid, robust, and based on common sense."[12]

As the Justice steadfastly maintained throughout his tenure, the jury cannot accomplish that goal if prospective jurors are excluded on basis of race[13] or sex,[14] or if racial or gender bias infects the decision-making process.[15] The reason, he explained, is that the presence of bias or predisposition in jury deliberations, either in perception or fact, risks "a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right."[16] A properly functioning jury thus reflects how discourse and debate ought to proceed in other spheres.

The jurist on display in those decisions—the jurist who embodies the virtues of civility, restraint, and humility, and who listened with an open mind and heart to all who appeared before him—is in large measure why the Court remains our nation's most revered institution. Public confidence in government has unfortunately waned in past years, but the Court retains a

9. *Id.* at 1729, 1731.
10. *Id.* at 1732.
11. 137 S. Ct. 855 (2017).
12. *Id.* at 861.
13. *See, e.g.*, Powers v. Ohio, 499 U.S. 400, 404 (1991) (Kennedy, J.).
14. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 151 (1994) (Kennedy, J., concurring in the judgment).
15. *See Peña-Rodriguez*, 137 S. Ct. at 868-69; *J.E.B.*, 511 U.S. at 153 (Kennedy, J., concurring in the judgment) ("A juror who allows racial or gender bias to influence assessment of the case breaches the compact and renounces his or her oath.").
16. *Peña-Rodriguez*, 137 S. Ct. at 869.

reservoir of trust and good will. This is so not only for the civil tone that Justice Kennedy helped to foster, but also because his openness and decency conveyed to all sides that their positions would receive a respectful hearing and had a chance—perhaps just a small one, but a chance nonetheless—of prevailing. That quality of the Court as an institution has to this point helped to ensure that its judgments, while often harshly criticized, are invariably accepted in nearly all quarters. As a body with no power over "either the sword or the purse,"[17] that quality is essential to its central and enduring position in our democracy.

It is impossible to overstate the importance of the values and virtues that Justice Kennedy embodies. We are a nation of laws, but as the Justice well understands, the fate of our republic rests not only on the words inscribed in our Constitution and statutes, but also on our hearts and norms. Our democracy depends on standards of behavior, common decency, principled judgment, and a capacity for self-doubt, each giving rise to the restraint and openness essential to a healthy polity.

That these values are imperfectly respected and observed in public and private life provides grist for much of the Supreme Court's work. This is a matter on which Justice Kennedy occasionally would pause in separate concurrences, on behalf of only himself, to personally reflect.

Very early in his tenure, in *Texas v. Johnson*,[18] Justice Kennedy cast the vote decisive to the Court's holding that the First Amendment protected from criminal prosecution a man, Gregory Lee Johnson, who desecrated the flag by burning it while those around him chanted: "America, the red, white, and blue, we spit on you."[19] The Justice penned a short but powerful concurrence expressing "distaste for the result"[20]—a distaste that certainly arose from Johnson's having exhibited the very opposite of civic virtue, dignity, respect, and civility. As Justice Kennedy explained:

> For all the record shows, [Johnson] was not a philosopher and perhaps did not even possess the ability to comprehend how repellent his statements must be to the Republic itself. But whether or not he could appreciate the enormity of the offense he gave, the fact remains that his acts were speech, in both the technical and the fundamental meaning of the Constitution.[21]

Near the middle of his tenure, in *Vieth v. Jubelirer*,[22] Justice Kennedy cast the vote decisive to the Court's rejection of a suit challenging as a partisan gerrymander a congressional map drawn by a state legislature. As his concurrence explained, the Justice voted as he did despite his belief (which, he noted, the plurality shared) that partisan gerrymandering is incompatible with

17. THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
18. 491 U.S. 397 (1989).
19. *Id.* at 399.
20. *Id.* at 421 (Kennedy, J., concurring).
21. *Id.*
22. 541 U.S. 267 (2004).

democratic principles, and only because no viable constitutional standard had been proposed for ascertaining when such a gerrymander had gone too far.[23] Still, Justice Kennedy noted that the legislature had not displayed the virtue, restraint, and judgment essential to our democracy:

> The ordered working of our Republic, and of the democratic process, depends on a sense of decorum and restraint in all branches of government, and in the citizenry itself. Here, one has the sense that . . . restraint was abandoned. That should not be thought to serve the interests of our political order. Nor should it be thought to serve our interest in demonstrating to the world how democracy works.[24]

Earlier this summer, the day before announcing his retirement, in *Trump v. Hawaii*,[25] Justice Kennedy cast the vote decisive to the Court's rejection of a challenge to a presidential proclamation restricting the ability of persons from certain countries to enter our country. The challengers claimed (among other things) that the proclamation was issued for the purpose, prohibited by the Establishment Clause, of excluding Muslims. They observed that the President, while a candidate for the office, called for a "total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on," stated that "Islam hates us," and asserted that the United States was "having problems with Muslims coming into the country."[26] In his concurrence, which agreed with the Court that, despite its backdrop, the proclamation permissibly exercised the President's legally granted authority over the admission and exclusion of foreign nationals, the Justice offered "this further observation":

> There are numerous instances in which the statements and actions of Government officials are not subject to judicial scrutiny or intervention. That does not mean those officials are free to disregard the Constitution and the rights it proclaims and protects. The oath that all officials take to adhere to the Constitution is not confined to those spheres in which the Judiciary can correct or even comment upon what those officials say or do. . . .
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> . . . An anxious world must know that our Government remains committed always to the liberties the Constitution seeks to preserve and protect, so that freedom extends outward, and lasts.[27]

It is not for a former clerk offering a tribute, particularly one who sits as a federal judge, to express agreement or disagreement with these or any of Justice Kennedy's other votes. But it is striking how of a single piece are these three concurrences, how consistent throughout the Justice's tenure have been his

23. *Id.* at 316-17 (Kennedy, J., concurring in the judgment).

24. *Id.*

25. 138 S. Ct. 2392 (2018).

26. *Id.* at 2417.

27. *Id.* at 2424 (Kennedy, J., concurring). The majority opinion in *Trump*, authored by Chief Justice Roberts and joined by Justices Kennedy, Thomas, Alito, and Gorsuch, shared these concerns, at least as to the factual circumstances of the case. *See id.* at 2417-18 (majority opinion).

concerns and prescriptions. And I will confess to having felt deep sadness in reading Justice Kennedy's words, particularly his final concurrence, for in them I sense his heart heavy at the recognition that democratic norms, civility, and restraint have not become as firmly rooted as they ought or need to be.

I hope I am wrong in surmising—and it is nothing more than surmise—that Justice Kennedy's heart was heavy at the close of his over four decades of active service as a federal judge and three decades on the Court. For all the Justice has done for our nation—as a jurist, a public servant, and a model for how those holding high office ought and need to conduct themselves, to speak to and about others, and to discharge their solemn obligations—he deserves far better. I hope, rather, that the Justice and his family take tremendous pride in his having served as the nation's foremost practitioner of, and advocate for, the virtues that Jefferson believed essential to our civic health. May his example continue to light that path.