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AMERICA—A NATION OF LAWS AND OF PEOPLE†

SOL WACHTLER*

We have spent a good part of this past year celebrating the success of the democratic experiment—and by any standard of which I am aware, our celebration has been justified. We are the children of a nation of immigrants. Some of those immigrants were our own parents, or grandparents. Many spoke an alien language. Most were poor and uneducated. They arrived here with no readily marketable trade or talent, and, perhaps most significantly, they lacked both knowledge and experience with the democratic process. That they survived—and in fact thrived—is a testament not only to their own fortitude, but to the foresight of our constitutional forebears, and to the seeds of a just government which they planted so firmly. We can be rightly proud of our bicentennial, for those who came before us did their work well.

Yet we would be negligent to stop with a celebration of the past. Celebrations are also a time to consider where we are now, and what the near future holds in store for us. The chronicle of our progress, of course, is a subject lawyers should approach with some delicacy, for history suggests that members of the legal profession are largely responsible for the present state of our affairs—and the clergy, I suspect, is responsible for the remainder. Thirty-four of the fifty-five representatives at the Constitutional Convention were lawyers, and a similar proportion of lawyers have since been present in Congress, in each President's cabinet and in many of our state legislatures. If the judgment is poor, therefore, we are responsible and must take the blame. If it is good, however, we must be modest. The dilemma is not altogether enticing. But I will not hold you in suspense for very long. Over the past few weeks, I have taken a survey among my colleagues, and in typical judicial style, we have decided that the present is not altogether a failure—by a vote of 4 to 3.

There is, I think, a popular tendency to believe that the past had done its work for the present, and that our liberty is guaranteed. The truth is

† Bicentennial address delivered at the Church of the Ascension, Rockville Centre, New York, on September 19, 1976 at a ceremony celebrating the opening of the court year.

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that one generation can never protect the rights of another. Our greatest documents, the Declaration of Independence, the Constitution, and the Bill of Rights, are ideal reflections of man's finest aspirations, but they are not self-fulfilling chariots of justice. For all their beauty, they are only words, dependent on each generation to give them a meaning and content for its own time and place.

I cannot think of words less in need of annotation than the truth so proudly declared self-evident at our nation's birth: that all men are created equal. Yet, it is all too clear that while our forefathers wrote those words with a heart full of devotion to freedom and justice for mankind, they never once meant to include the black race, or women. Every generation, from *Dred Scott*¹ to the thirteenth and fourteenth amendments, to *Plessy v. Ferguson*² and *Brown v. Board of Education*,³ to the nineteenth amendment and the proposed equal rights amendment, has given the simple words, all men are created equal, a meaning and content all its own.

We have seen the same change and expansion of meaning occur with virtually all of our constitutional principles, and as the pace of our lives has quickened, so too has the pace of change. The first amendment guarantee of free speech has been applied to forms of communication not in existence when the first amendment was adopted.⁴ The search and seizure provision of the fourth amendment has, in the course of forty years, traveled from Cardozo's famous refusal to accept that "[t]he criminal is to go free because the constable has blundered,"⁵ through the "silver platter"⁶ stage, to a substantive guarantee, protected and enforced by the highest Court in the land,⁷ and just this past year it seemingly slipped a little, to a status not worthy of federal review.⁸ The sixth amendment's right to counsel has moved from almost meaningless to truly substantial in just a few short years,⁹ and so has the fifth amendment's privilege against self-incrimination.¹⁰ As recently as 1963, the late jurist Bernard Botwin could accurately write that "[c]ontrary to popular belief, police are not obliged to advise an accused under interrogation of the right to counsel or to provide counsel for him if he is indigent,"¹¹ and "[t]he Constitution does

¹ 60 U.S. (19 How.) 393 (1857).

² 163 U.S. 537 (1896).

³ 347 U.S. 483 (1954).

⁴ See, e.g., *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

⁵ *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587, *cert. denied*, 270 U.S. 657 (1926).

⁶ See *Elkins v. United States*, 364 U.S. 206 (1960).

⁷ See, e.g., *Chimel v. California*, 395 U.S. 752 (1969); *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁸ See *Stone v. Powell*, 96 S. Ct. 3037 (1976).

⁹ See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

¹⁰ See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966); *Malloy v. Hogan*, 378 U.S. 1 (1964).

¹¹ B. BOTEIN & M. GORDON, *THE TRIAL OF THE FUTURE: CHALLENGE TO THE LAW* 66 (1963).

not expressly, or by judicial construction, require the police questioning a suspect to warn of the risk of self-incrimination or to explain the right to keep silent."¹² In the fifteen years since Justice Botein wrote those words, the right to counsel and the right to remain silent have become so second-nature to judges and lawyers that they almost seem like part of our common law heritage. They are not. They are the handiwork of this generation and they reflect not inherited institutions, but *our* principles, *our* morality and *our* sense of justice. They are the stuff by which the future shall judge the present. As Thomas Jefferson phrased it, in a free society, "[n]othing then is unchangeable but the inherent and unalienable rights of man."¹³

Of course, I would not want you to think that only the legal profession is forever changing the meaning of words. The press also does its share of interpreting. Consider this sample of literary heritage. On August 5, 1890, the shipping page of the New York Herald carried the notice that "The Empress of China arrived yesterday on her maiden voyage." The next day, a new Yiddish paper, struggling for survival on the lower east side, carried the headline "The Empress of China has Come to America to Look for a Husband." Language is always subject to misinterpretation.

As a people, we are fond of the observation that ours is a nation of laws and not of men. It too, like the words of our great laws, seems to lend security, a sense of certainty, and a predictability to the paths we travel. In the law particularly, the thought that past generations have separated right from wrong and good from evil can be comforting. Yet, here again, if we will just scratch the surface, we will find that the greatest responsibility for our national welfare does not rest with statutes carved in stone but with the principles, conscience, and morality of the individuals who constitute this generation.

Consider a criminal proceeding. If freedom is our most cherished liberty, then the deprivation of freedom, for a violation of the criminal law, is the state's most awesome exercise of power. A criminal charge is initiated by one person—the District Attorney. He has the power to investigate and to subpoena. He decides whether to prosecute or not, and, if so, for what crime. To charge a misdemeanor, he need consult no one. For a felony, in this state, the consent of a grand jury is required; but as any District Attorney will tell you, that is usually little more than a formality. In the discretion of one man, therefore, we place nearly full authority for requiring an individual to defend his freedom against the full power of the state.

We surround the criminal trial with statutes and rules of evidence to insure a fair proceeding, yet the question of guilt or innocence we ulti-

¹² *Id.*

¹³ Letter from Thomas Jefferson to Major John Cartwright, 1824.

mately consign, wisely, to the secret deliberation of a jury of individuals. Discretion, again to convict or acquit, rests on the collective individual's conscience, morality, and sense of justice.

Finally, if there is a conviction, our law imposes enormously broad bounds on sentencing and then leaves to the conscience of an individual judge a discretion ranging from freedom or probation to years of incarceration.

I have no doubt that we are a nation of laws. We are a nation dedicated to the principle that the law binds all men equally, and that no man is beyond its reach. Just two years ago, this country witnessed the resignation of a President in disgrace and the indictment of other high officials, including a former United States Attorney General. It was an occasion for shame and sadness, but it also put our institutions to the test of a nation of law, and they stood the test well. Yet, a nation of law is not an end in itself; it is but a part of our aspiration to be a nation of justice. We can write all the laws we wish, but our strength, or our weakness, finally rests with the resolve of our people to be a land of justice. Only the individual can bring to bear those elements of justice and discretion, mercy, compassion, and the recognition of human fallibility, without which the law is cold, impersonal and often harsh. Only the individual can fulfill the injunction of the holy scriptures: "To do justly, and to love mercy, and to walk humbly with thy God."¹⁴

Each year our laws increase in number and complexity. Each year, more and more is resolved in our courts. We have done much to make justice accessible to our people, but a great deal still remains to be accomplished. It is a process which does not belong to the judges and lawyers alone. Justice is every man's business, for ultimately, under our system, justice begins and justice ends by the consent and the will of the man in the street.

Time moves quickly, and while the present may seem eternal, all too soon future generations will be here to appraise us. When they do, they will hopefully conclude: This was our nation—still in its youth—and it too did its work well.

¹⁴ *Micah* 6:8.