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PROTECTING INDIVIDUALS' RIGHTS: THE COURTS' RESPONSIBILITY IN A CHANGING SOCIETY†

*By The Honorable Rose Elizabeth Bird**

It is indeed an honor to be here today to receive this fine award. It is also a privilege to be introduced by Judge Egly.

The person after whom your society was named, Sir Thomas More, was a remarkable individual. He was a skilled lawyer and an able scholar—a person of great conviction and courage. He understood the importance of the law to the preservation of liberty. As Sir Thomas himself put it in Robert Bolt's excellent play, "when the last law was down, and the Devil turned round on you—where would you hide, . . . the laws all being flat? This country's planted thick with laws from coast to coast . . . and if you cut them down . . . d'you really think you could stand upright in the winds that would blow then?"¹

These words ring true today. As columnist Arthur Hoppe recently remarked, "I'm afraid that we are swiftly reaching the point where defending the Constitution . . . will require an act of courage."² Fortunately, we are not without persons who possess that courage, who personify the strength of character that distinguished Sir Thomas More. And if anyone in our midst can be said to exhibit those qualities, that individual is surely another "man for all seasons," Judge Paul Egly. I am pleased to have this opportunity to acknowledge his selfless contributions to the people of this state.

I am also pleased to be able to share with you some reflections on the problems our society and our courts are facing today.

One of the greatest assets of our society has always been its diversity. If there is any distinctive American political genius, it surely lies in our ability to draw strength from our diversity of races and religions, with all of their richness of sociopolitical viewpoints. We have shown

† Text of a speech delivered on April 5, 1981, in acceptance of the Medallion award of the St. Thomas More Law Honor Society. Chief Justice Bird was introduced by the Honorable Paul Egly, Judge of the Superior Court for Los Angeles County.

* Chief Justice of California.

1. R. BOLT, *A MAN FOR ALL SEASONS* 66 (Random House ed. 1962).

2. Hoppe, *Fear*, *San Francisco Chron.*, Feb. 18, 1981, at 51, col. 5.

an almost uncanny knack in the past for taking that which is best from the various cultures and molding it into a uniquely practical and idealistic amalgam known as the American character.

By no means has this process always been smooth. We have stumbled many times along the way—from the bonds of slavery in the nineteenth century to the Japanese-American internment camps of the twentieth century. Despite such exceptions, there has been a sense of progress in our efforts to bring about social justice and equality for all.

However, several events of the past decade seem to have significantly diverted that energy and altered that spirit of national optimism. The war in Vietnam and the stunning revelations of Watergate made us question our faith in ourselves and in our supposedly shared values as we had not done since the time of the Civil War.

Were we a nation that loved peace, or a nation that sought out war? Were we a nation governed by the strength of our laws or ruled by the whims and frailties of our leaders? These were profoundly disturbing questions because they went to the heart of our perceptions of our country as a truly democratic society. But the questions were not to end there, for the past decade has forced us also to question our traditional status as the land of economic opportunity. It seems that nothing is free any longer in the land of the free.

The optimism ushered in by an age of abundance only a generation ago is waning, overshadowed by the material worries of a new generation hemmed in and haunted by the resurgence of scarcity, inflation, and unemployment. Twenty-five years ago, a gasoline shortage would have been unthinkable. There was no rampant, double-digit inflation year after year. A \$75,000 house used to be a mansion. Now it's a bargain. And variable interest rate home loans, starting at fifteen percent, are the order of the day—assuming you can borrow the money to make the down payment in the first place. We live on credit, constantly mortgaging our tomorrows to pay for what we consumed yesterday.

Yes, it is a very different world now than it was a generation ago. Without a doubt, this is an age of transition. In many ways, these are unkind and fearful times. We live in a society where belief in our government and in the strength of our institutions is declining. Our society is characterized by impermanence and uncertainty, by mobility and alienation, by a curious blend of unrest and complacency. We are searching, but we are unsure of what we seek. As psychologist Rollo May has observed, the real problem for people today is not the meaning, but the meaninglessness of life. He sees our society reaching a

crisis point similar to those reached by the ancient Roman and Greek civilizations: "We live at a time when our culture is disintegrating. The values that have lasted to the 20th century no longer have cogency."³

Those institutions which once gave us strength and identity—the churches and synagogues, the schools, the neighborhood associations, even the family unit itself—are in disarray and retreat, unable at times even to protect themselves. Our governmental institutions are undergoing the same crisis of confidence.

A century and a half ago, when Alexis de Tocqueville traveled through America, he foresaw the potential for the isolation of the individual that seems to be manifesting itself today. He sought to warn us of the forms of despotism that might threaten the United States some time in the future. His words speak today with chilling accuracy: "Each [person], living apart, is as a stranger to the fate of all the rest; his children and his private friends constitute to him the whole of mankind. As for the rest of his fellow citizens, he is close to them, but does not see them; he touches them, but he does not feel them; he exists only in himself and for himself alone; and if his kindred still remain to him, he may be said at any rate to have lost his country."⁴

Unquestionably, this is not the sort of outlook that breeds a sense of security, and our national psyche reflects the age of uncertainty and instability in which we live. Frustration and fear are very natural reactions when people feel their lives are being shaped by forces over which they can exercise little or no control. Read the papers. Watch the television news. You cannot mistake it. The frustration and the fear are there. And with them, arising out of them, comes anger—anger such as that reported by the media recently of the resurgence of acts of vandalism against blacks and Jewish synagogues.

There is power in such anger, but there is great danger as well. In the past, our nation has derived unity from its diversity. From the many strands which comprise our social fabric, there has been woven a tapestry of richness and beauty and strength. But should those strands begin to unravel, should they be viewed as unlike and dissimilar rather than as part of a whole, then that tapestry will be destroyed. There is a very fine line between diversity and fragmentation, between respecting our differences and resenting them.

3. Fortney, *Our Culture May Be Ending, But The Next One Will Be Better*, Peninsula Times Tribune, May 10, 1980, at A1, col. 1.

4. 2 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 336 (Vintage Books ed. 1945) [hereinafter cited as *DEMOCRACY IN AMERICA*].

History has shown us that when economic uncertainty gives birth to fear and fear gives rise to anger, people tend to focus that anger on those who are not like them. In America, that means the poor, the unemployed, and the minorities of various races and religions and national origins. Those groups are singled out as the object of anger not because they are the cause of problems which are perceived, but because they are the least able to defend themselves from criticism and attack. For the sort of anger to which I refer seeks not solutions but scapegoats. It demands not an answer but a sacrifice. And when anger is turned upon these groups, it inevitably extends itself to the Constitution, the Bill of Rights, and the courts, which are sworn to uphold the individual freedoms guaranteed by those documents as a protection against potential abuses of the power of the momentary majority or the state.

Our courts are crucial to the preservation of individual rights in our society. Supreme Court Justice Lewis Powell recently stated the judiciary's role quite succinctly: "All three branches of our government have supported the great ideal of ordered [personal] liberty. Yet it is the courts . . . that have assured it."⁵

The question that faces us squarely today is whether the judiciary can continue to play that vital role. It is an undeniable fact that courts are particularly vulnerable to attack during times of societal transition. And this vulnerability is accentuated in a country such as ours, which is so geared to the present moment and so swayed by the power of public opinion. Not surprisingly, these two phenomena are closely linked.

We have truly become an "instant" society—instant communication over the telephone, instant entertainment by means of the television, instant food in throw-away containers. Our news is instant, too, and we treat it as a disposable commodity just as we do our convenience food. We know in detail what happened today on the other side of the world—bulletins at 5:30, eyewitness reports at 6:30, and film at 11:00—but we often cannot remember the events of ten years ago, much less begin to correlate them with today's occurrences.

The TV news may be in color, but it comes across in blacks and whites. As Walter Cronkite recently remarked, "The emphasis is on crime, barn burnings and jackknifed trailer trucks. The deeper stories at City Hall and the county court and the statehouse don't get the

5. Address by Lewis F. Powell, Jr., Associate Justice of the United States Supreme Court, Dallas, Texas, May 1, 1980.

proper attention.”⁶ Subtleties are necessary casualties of the ratings wars, and long run consequences that cannot be explained in less than one minute are simply not explained at all. We crave information as though it were knowledge, accept others' opinions as though they were facts, and focus on momentary trends as though they provided historical perspective.

Almost imperceptibly, we are losing our sense of history and with it a measure of our humanity as well. History is the story of people. It is a chronicle of continuity, a cavalcade of the thoughts, the actions, the dreams, the ambitions of real men and women. Today, however, we increasingly associate the people who are shaping our world with images on a screen rather than with flesh-and-blood human beings.

The camera focuses its eye on them, captures their image in an instant, and then disperses it by microwave to the consuming public. The image is the salable item, and the people from whom it has been wrested are merely disposable commodities.

Along the way, form often is exalted over substance, and oversimplification is mistaken for clarity of thought. The appearance of whatever is being packaged—be it food, news, or even our political leaders—becomes far more important than the package's contents.

For example, our politicians today are inextricably caught up in the business of selling an image of themselves. That image has no room for genuine feelings and emotions or human weakness. Instead, the emphasis is on persona in the personality magazine sense of the word—whom do the politicians date, do they jog, have they taken est, how do they get along with their spouses or children?

A barrage of intrusive trivialities is substituted for any discussion of ideas about matters of public concern. Substantive issues are discarded in favor of one-line slogans couched in catchy prose. And so packaging becomes everything. And in the process the people to whom we entrust political office allow themselves to be stripped of their privacy and robbed of their humanity, all in the name of creating the instant image that sells.

However, this process of dehumanization is not without its appeal to the politician's instinct for survival. Should the package fail to sell, one simply changes the wrapping and tries again. Since the image and the real person are never the same, politicians who understand the relationship between image and media can come back from the depths of

6. Cronkite: *Local TV is Too Superficial*, San Francisco Examiner, Mar. 9, 1981, at A5, col. 1.

unpopularity again and again. The public opinion polls abound with statistical proof of such seemingly miraculous political resurrections. The different images may be jarringly inconsistent, but consistency is no prerequisite to success in a society so conditioned to focus on the moment.

The private sector is by no means insulated from similar pressures, as the recent flurry of media reports about the so-called "Mary Cunningham-Bendix affair" graphically illustrates. Whatever the truth of that matter may be, its media portrayal quickly became an exercise in personality probing and pop psychology. As the managing editor of a large metropolitan newspaper stated: "This story was made to order It has everything—feminism, sex, business intrigue."⁷ In all areas of our culture, the primary criteria for success seem to be "how fast can I tell it and how quickly can I sell it."

In recent years, this emphasis on the moment has enhanced the stature of public opinion polls and surveys as means by which the "will of the people" on any given issue supposedly can be swiftly discerned. The perils inherent in this practice are great. Once again, Tocqueville's words are directly on point: "by whatever political laws men are governed in the ages of equality, it may be foreseen that faith in public opinion will become for them a species of religion, and the majority its ministering prophet."⁸

At times when old ethical standards are in flux, there is a powerful temptation to construct a new system of morals out of whatever values temporarily may command the majority's allegiance. The unfortunate result is an ethics based on expediency and convenience rather than on enduring human values.

Let me speak specifically for a moment of the adverse impact these aspects of our modern technological society can have upon the judicial system. Our courts, especially at the appellate level, are in many ways the antithesis of the "cult of the instant." Of necessity, they deal in grey areas, they delve into subtleties, they take into account the long run, the historical view. At a time when fewer and fewer people read, the appellate courts must continue to speak through the written word. If public opinion has indeed become a religion, then the courts must take the role of iconoclasts. The other branches may choose to deal with issues by simply relieving the political tensions of the moment. The courts, however, cannot resolve legal issues in that way. Rather, they must

7. *The Mary Cunningham Story*, NEWSWEEK, Oct. 27, 1980, at 83.

8. DEMOCRACY IN AMERICA, *supra* note 4, at 12.

bear in mind the future development of the law and the preservation of constitutionally guaranteed rights and liberties.

Should the courts' decisions be criticized, the justices cannot step outside of their judicial role and respond as a politician might. Politicians are expected to be responsive to the various special interests comprising their constituencies. But judges must remain responsive to the Constitution and answerable to their oaths of office.

Granted, this makes judges easy targets at a time when few people understand the role of the courts. As the ultimate protector of the Bill of Rights, the courts are unavoidably cast in an unpopular light during an era of special interest politics, since they may not respond to the pressures of the moment.

Those people who seek redress from the courts are often unpopular themselves. They will likely be without any special interest constituency to back them. But their standing before the courts does not depend upon their backing and must never be permitted to do so.

Lack of understanding of the judicial branch's role has led to accusations that our appellate courts are closed institutions. However, as Anthony Lewis of the New York Times has pointed out, quite the opposite is true. Appellate courts are one of our most open governmental bodies in that whatever action they take, their decisions must be accompanied by written reasons. They are unique in that they speak on issues of great complexity and social significance with a collective voice, at a time when individual voices are in vogue.

For these reasons, appellate opinions simply do not translate into the sort of instant answer that fits conveniently into a sixty-second spot on the evening news. However, that is scarcely a basis for seeking to change the way in which the judicial branch functions. To the contrary, it is a strong argument in favor of continuing to insulate our courts from the politics of the day so that they may focus clearly on the constitutional principles that have preserved our individual liberties for the past 200 years. It was no accident that Chief Justice Phil Gibson was the *only* state official to speak out publicly against the incarceration in concentration camps of our Japanese citizens during World War II.

Our courts must never allow the voice of the Bill of Rights to be drowned out by the clamor of the moment. As Tocqueville quite rightly perceived, the judicial power is particularly vital to freedom "at a time when the eye and finger of the government are constantly intruding into the minutest details of human actions, and when private persons are at once too weak to protect themselves and too much isolated for them to reckon upon the assistance of their fellows. The

strength of the courts of law," he concluded, "has always been the greatest security that can be offered to personal independence"⁹

Preserving that personal independence during a period of transition is indeed a delicate and difficult task. And it is a task which our courts cannot accomplish alone. Rather, it is an enterprise in which all of us must take part.

By definition, a transition is a passing from one condition to another, and in the case of societal transition we are speaking of the human condition in its broadest sense. To be sure, such historical watersheds are marked by confusion, anxiety and a sense of "spiritual despair." But they also present us with unique opportunities to achieve positive change.

If our society has lost some of its vitality, then what better time to follow a course of action that can bring hope and purpose to our lives. What better time to sharpen our ethical senses in order that we may achieve a clearer understanding of ourselves and our fellow human beings. The disintegration of a culture can lead either to its death or its rebirth.

The direction to be taken is a matter of choice rather than fate. And that choice depends on commitment. If we wish to find meaning in life, then we must be committed to basic human values such as love, courage, justice, and fairness. To reassert those qualities and to construct an ethical framework in which they can function are the splendid challenges with which we are presented.

We have a very real choice confronting us. We can give in to the fears of uncertainty, join in the search for scapegoats, vent our anger against the easiest targets we can find, and perhaps destroy our system of ordered liberty in the process. Or, we can understand the reasons for our uncertainties, accept the challenges which this shrinking world presents, and strive once again to achieve a society where respect for our differences will assure us our rights as individuals and our unity as a nation.

All of us, as citizens in this age of challenge, must be willing to run against the tide of the moment, ready to take the long view into account, and able to recognize short-sighted self-interest for the mistake that it is. More and more often, our society will have the need to call on those with the courage to stand up, at a time when such acts are given scant recognition and encouragement.

The approbation of others should never be viewed as a prerequi-

9. *Id.* at 343.

site to upholding and defending the individual liberties accorded us by the Constitution and the Bill of Rights. I welcome your strength of character, your dedication, your vigilance, and your courage as our society prepares to make the difficult choices facing it in the coming years.

