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University of North Carolina to the Conference of the
Fourth Judicial Circuit of the United States at
Hot Springs, Virginia, June 27, 1969)

Some General Thoughts on the State of the Republic and the Obligation of the Legal Profession to It

Given these times and this audience, my theme--the state of the republic and the obligation of the legal profession to it--is perhaps the inevitable one. Lest you be concerned by its potential sweep and hence the probable longevity of this talk, let me hasten now to narrow the compass. Of course, by "state of the republic" I have in mind something far less sweeping than the total range of our national condition. In the first place, my thoughts are on its internal state, not on the awesome problems of its external relationships which could, we all know too well, turn out to be the decisive ones to its continuation in any condition. Furthermore, I have in mind even more narrowly than the full range of domestic problems those more ineffable qualities of our national life which are at least partially captured in the term, "social fabric". This defines, admittedly in severely limited ways, those aspects of our common life which bind us in informal, largely subconscious ways; but which provide that fragile consensus on which our formal structures and institutions are utterly dependent. This is that essential "consent of the governed" upon which the republic was founded and whose continued existence in adequate mass we have been able generally to assume ever since.

How firmly stands that fragile consensus today? How strongly holds the "social fabric"? How much still shared is a common "American Dream"? These are the specific questions about the state of the republic that I have in mind. For two reasons. First, because they are the most profound, the bedrock, the ultimate questions about our total national condition. As stands the consensus, as holds the fabric, so stands, so holds the republic. These questions thus transcend in importance those more visible material and physical and technological problems of our time which obsess us, because in the answers to them are ultimately to be found the answers to the more tangible problems. If the social fabric holds, and if the national will is up to it, the sheer physical means are now or will in near time be available to solve the essentially physical problems. If not, no amount of technological capacity or material resources will avail us. Secondly, because the social fabric is something for which we of the legal profession have a primary responsibility and about which there are some things we can do, if we but have the will.

If these are indeed the bedrock questions about our current national state, the surface evidence is that we are in deep, deep trouble. It is of course easy for every age to feel apocalyptic about its own time. The Jeremiad is a

constantly recurring theme-song in history. But any sober look-around today confirms the evidence of our profound national malaise--of some ravelling of the social fabric, of some trembling of the essential consensus, of widespread disillusionment with the Dream. The manifestations: of unprecedented divisiveness, discord, dissidence, unrest, of mindless activism and overreaction, of lash-out and back lash, of aimless and frantic hedonism, of the pervasive despair which lies behind "copping-out" and "turning on", are too much with us all to require any dismal cataloging of specifics. They provide today a constant accompaniment of nagging depression to the lives of us all. They are real, and not tormented figments of some national neurosis. Exacerbated without question by deep concern over the specific tragedy of Viet Nam, they transcend it and are not traceable solely or even in major part specifically to it. Their unprecedented pervasiveness cannot be explained away as just the magnification of old constants by a sensationalist press armed now with new-technology for instant communication. Even our tragic floundering with the awesome problems of racial reconciliation is but a part, though undoubtedly a dominant part, of the larger phenomenon.

It is my own somber judgment that these justify an apocalyptic assessment of our national destiny such as has been justified only once, possibly twice, before in our history. Let me go further and suggest that in fundamental ways this particular time of internal testing may present more profound a challenge to our national destiny than did either the Civil War or the Great Depression. Each of those involved testing by identifiable trauma which were eventaully proven to be manageable by great individual wills acting in specific ways through the constitutional powers of the central government. This challenge is more diffuse, less subject to isolation and identification, much less subject to specific cures lying within the power of individual wills or of government. This one we must see through largely on the basis of such national will as we can muster: such staying power as we can summon; such commitment to the legitimacy of the American Dream as inheres in us. Let me go the final step and say that to me the outcome of the issue seems by no means free of doubt.

Here then is a stark, admittedly cursory, frankly worrisome over-view of the state of the social fabric on which ultimately depends the state of the republic. It was suggested that lawyers as lawyers have a special responsibility for its safeguarding and some capacity to discharge that responsibility if they but will. I am quite aware that the most fatuous speeches and the most numerous are likely to be those addressed to persons associated in trade or profession or on the basis of some common interest or experience (such as having served in the military) which have as their themes the unequalled, unique capacity of the group for saving the republic. It is not my intention to insult your intelligence in this way. After all, this is being said to only a very small percentage of the legal profession from a limited area of the country. And I have no illusions about the overall quality and character of our profession. While the longer I live the more I come to

appreciate their relative worth in matters of high consequence to society; while I find them by and large the most interesting people I meet in society; while I fully share Harrison Tweed's piquant observation that "they are better to work with or play with or fight with or drink with than most other varieties of mankind"--still I am under no illusions about us in the aggregate and through history. From Jesus' biting, "woe to you lawyers"; through Shakespeare's sardonic, "the first thing to do is kill all the lawyers"; to Dickens bitter thrust through Mr. Bumble, "the law is a ass", the judgment of those of greatest insight into our more unlovely proclivities through history is enough to disabuse us of too grand illusions. We may or may not on given occasions of crucial testing rise above individual concerns and concerns of the clientele to serve higher interests. The point is simply that we can in this particular setting if we but will.

The very first thing we can do is help provide a core of essential equanimity in a society experiencing the pervasive and diffusely based malaise we have described. That malaise is terribly compounded by sheer uncertainity as to its origins. There is a fear abroad that somehow completely new and unforeseen forces are at work among us; that the causes of our discontent are largely traceable to anti-social machinations of particular groups, and so lie outside that normally to be expected in a right unfolding of our history. On this view, the developments are indeed, by very definition, "un-American." This kind of uncertainty and suspicion has itself become a substantial, independent factor in the national mood. I am of course suggesting such phenomena as white backlash, mistrust of the Supreme Court, and like reflections of essentially fearful, uncertain moods.

It is my thesis that the realities justify a much calmer, more imperturbable view of the admittedly profound changes at work in our midst; that lawyers of all people have the means by their educations and their professional experience to perceive these realities; and that they should act the part in their public and private lives. Of course I am not suggesting that they should abdicate their private convictions nor partisan resistance to particular developments, not that they should lapse into some sort of sterile philosophic detachment or empty fatalism about the course of our unfolding history. But a man can retain his convictions and remain a partisan in specific affairs while exuding a helpful air of equanimity about larger processes. In fact, this, if you think about it, is one of the peculiar gifts of the great lawyer in even the common affairs of the profession.

If I am right that the realities of our history justify such an attitude, every man will of course have his own mode of perceiving these realities. Let me venture one man's - unsupported by empirical research, undocumented by footnotes, highly subjective, simply intuited (to use a term of derision in the groves of academe in which I move). It is advanced in all its weakness of generalization and incompleteness as perhaps suggestive at least of a rational view of that historical process which has brought us since our national beginnings to our present state.

When the founding fathers set us on our course under the basic charters, they did it under the influence of what were then profoundly revolutionary ideas whose main thrust was the liberation of individual man from repressions or even threats of repression by sovereign power. The Constitution is one of limited powers. The Bill of Rights addresses itself specifically to things that sovereign power shall not do to inhibit or repress the individual's impulse to do, to move, to think, to speak as he pleases. The wonder of this fundamental break with essentially all of recorded history up to that point--a history in which unrelenting, absolute or substantially absolute sovereign autocracy was the essential principle of social and political organization--is largely lost on us today. It is a commonplace--a given of all the time and conditions that we know. But what a profound gamble with the future it involved. When it insured the eventual liberation to a point approaching the absolute of the creative powers of the individual, it also insured as a necessary concomitant the liberation of many of the powers and impulses flowing from the darker recesses of humanity's unregenerate nature. When it insured, as it had to, that no essential restrictions should be placed by or with the aid of sovereign power upon the impulse to free lateral and vertical movement within the social frame, it not only insured the opportunity for individual advancement free of social or economic class lines which we prize. It also opened the door for unseemly scrambling, for divisive jealousies and resentments resulting from massive social displacement, and for the loss of those softening social mores and manners of personal deportment which a class-based society unquestionably contributes along with the less beneficial aspects of its paternalism.

In short, what the charters unleased was the potential--as far as governmental constraints were concerned--for this society to approach a truly open and egalitarian frame of social organization. The gamble was that by the time of near approach to this condition there would inhere in the society enough of tensile strength deriving from individual and group self-discipline, from individual and group commitment to the Dream of an open, pluralistic society as a thing truly to be desired, that the shock of final social re-adjustment to it could be withstood. The alternatives to success of the gamble were two, first, the chaos and anarchy, openly espoused now by a mindless few, and more directly suggested (and I am sure not really intended) by others simply giddy with the wine of the new openness, as they demand (apparently at all levels, and without limits), "participatory democracy". The second, a retreat in despair to blanket repression to impose order. There was no other alternative. This gamble could not, by its very nature, be re-thought once taken. It had then necessarily to run its full course. The thrust toward the egalitarian society seems to me inexorable once made structurally possible. It either degenerates into choas in its final stages, is halted and turned back in state repression which inevitably then mushrooms, or is accommodated to, ordered, and flourishes in the hands of an enlightened, self-disciplined citizenry.

And the gamble is just now coming home full force. These are the shock waves we feel--all of us. Not just the defeated presidential candidate of 1964, with dark foreboding calling attention cryptically to that which he need not name but which "you see when you look around"; not just the third-party candidate of our latest election much more bluntly and directly calling to the attention of his "forgotten man" of the white working class the movements in the social framework which were diminishing his "place" in the order of things. Not just these, but some of my traditionally liberal white friends explaining painstakingly without being asked, why they were sending their children to private schools rather than to newly integrated public schools. Not just these, but all of us here--in one way or another--as we brush up against some of more unlovely aspects of a society experiencing the first heady wine of true openness. The sheer banality of "do your own thing" as a tragic philosophical misreading of the Bill of Rights; the savage rejection of the tested pragmatism of liberal democracy and the unknowing reversion to old, sad, rejected history implicit in "non-negotiable demands" and "confrontations" as deliberate techniques of the "new politics"; the new and infantile obsession with open expression of the ancient vulgarities--to mention some of the more jangling, but purely surface manifestations of the deeper phenomenon.

Why just now? Well, in the first place, it hasn't been too long since the possibilities were first created. Less than two hundred years--so short a time in the slow grinding of this kind of social evolution in history. More profoundly, because when the charters were laid down, there were other powerful constraints on the inexorable thrust toward an egalitarian society. These have operated effectively until our very recent past to slow the process to the point of allowing fairly easy assimilation of newly emerging releases from constraints. Some of these were imposed by extra-legal hierarchies which exercised profound influence in preserving a fairly stable social fabric: family, church, school, the paternalistic employment arrangement, a generally accepted social stratification of society along economic lines. Other constraints have been found in the very events and conditions of our short national life. Physically developing a continent, fighting a terrible civil war, and two great World Wars, learning under the bludgeoning of periodic economic depression to construct a controlled yet still dynamic economy. These have almost continuously dominated our energies so that we have tended naturally to cling to old patterns of social arrangement while experiencing their overpowering dominance.

All these slowed the pace of the inexorable drive toward the outer limits of individual freedom. It is interesting to speculate the extent to which the founding fathers comprehended the true dimensions of the gamble; the extent to which they thought it likely always to be loaded on the side of success by the indefinite continuation of the tremendously powerful extra-legal hierarchies. It is my hunch that they undoubtedly overestimated the staying power of these in the face of the mass effect over periods of time of countless individual thrusts toward absolute freedom. Certainly they themselves were men who in their private lives mainly accepted, indeed implemented, many of the constraints which these hierarchies imposed. I would guess too that they overestimated the self-discipline likely to be exercised by the common man in the full flush of

his initial liberation from these constraints. (The classic liberal view of the "honest yeoman" has typically tended to overestimate him in this regard. A more traditional theological view of him out of our Judeo-Christian heritage would have predicted his reaction with more accuracy.) Be that as it may, it diminishes not one whit the validity of their impulse to structure the gamble as they did. Believing so fundamentally in the ultimate error of repression, they could not have done it otherwise.

In any event, the most obvious phenomenon of the social milieu in which I have lived my life has been the withering away of these extra-legal constraints. Some have gone as the result of court decisions that the constraints were now so infected with the power of the state that they fell under Constitutional inhibition. Others, such as those long imposed by church and private school and family, are now simply yielding to the insistent, cumulative impulse to freedom in human affairs, large and small. However they have gone, the process of their going is best seen as the inevitable working out of the gamble as we pass through the shock wave which lies just this side of the optimum open, egalitarian society to which we can successfully accommodate.

There are many interesting facets of this development. We are here most concerned with this one: that as these last powerful extra-legal modes of constraint pass away, the law is left as the only effective ordering force beyond individual and group discipline of the citizenry. In the words of my social science colleagues, it becomes increasingly the dominant "normative order." While the other constraints had vitality, they served as buffers against the necessity for invocation of the law in those final hard places where individual freedoms collide in ultimate abrasion with one another and with the interests of society at large. For example, we had no real necessity for attempting the impossibly hard legal decisions about the limits of permissible obscenity so long as there was general acceptance of those extra-legal constraints which private codes and church notions of morality imposed and transmitted. Now the raw nerve ends of the law and of the legal process are exposed increasingly to the painful hammering out of the final boundaries for the exercise of individual rights and freedoms. Long spared the full impact of this burden, the strain is now profound. It is this which we feel as deep controversy develops over the implications of the fateful constitutional decisions of our recent history.

How, you well may say, can such a way of interpreting the historical realities of our situation contribute to any sense of equanimity? Surely, to see us in the critical stages of a tremendous gamble with out national destiny can do little to ease apprehension at the specific events of the time. I can only answer for myself here. My apprehension is not lessened--I have stated it in the starkest terms of having no perfect confidence that the gamble will succeed. But I am helped to some degree of equanimity by the interpretation of these events which such a view compels for me. In the first place, it is of great comfort to me to believe that the gamble had to be taken in the way it was; that

there is no fundamental error in the basic decision. Some among us begin openly to express that doubt. Those of us who don't share the doubt need to say so--often. Again, it saves from fitful and fearful mistrust of a beleaguered judiciary which is having to make the profound decisions which the ripening of the gamble in our day compels. It allows me, that is, to assess specific constitutional decisions, even those with which I disagree, as involving at the worst errors of judgment in solving tough problems in tough times, in close cases, rather than as conspiratorial onslaughts on the American way by venal men, or as soft-headed coddling of criminals by naive do-gooders bent on encouraging obscenity and irreligion.

On such a view of things, for example, those most controversial decisions in Mapp and Escobedo, Mallory and Miranda merely reflect in microcosm an essential quality of the larger gamble of our history. In these decisions we are simply now guessing in specific and ever more sensitive contexts what the larger gamble eternally guesses--how far the state of our civilization, the strength of our institutions, permits us to read the "due" in due process in favor of the individual confronting the ultimate constraints of our criminal law. The specific gambles of these decisions, taken at this critical stage of our history, were presaged--indeed made inevitable, sooner or later--by the taking of the larger gamble made at our foundation. If they are "wrong", their wrongness is a matter of exquisitely delicate miscalculation of the current balance of risks between the threats posed to society by individual misdeeds and the countervailing danger of condoning or encouraging intolerable patterns of police repression. In this sense, their rightness or wrongness cannot be determined by any facile resort to the interpretation of precedents. As this balance shifts in our history--as surely it has and will--we must expect judicial estimates of the due-ness of due process to be reexamined in the light of the shifts. And if we believe with Mr. Churchill, as we must, that the true mark of a society's civilization is found in the protection it accords to individuals in its administration of criminal justice, then we must hope that these estimates can always rightly move in the direction indicating a steadily maturing civilization. Furthermore, such a view compels the understanding that the "rightness" or "wrongness" of these decisions is not even discernible until more evidence is in as to the effect which they themselves will now actually have on the balance of risks. In sum, in a lawyer's perspective, these decisions should be viewed and interpreted to laymen with imperturbability and on a wait-and-see basis which understands that the evidence of their impact is not yet available, and that the answer, if in time that evidence suggests basic miscalculation, is decisive but cool-headed retrenchment and correction within the system, rather than the voicing of personal invective toward and suspicion of the judiciary.

It may well be that these cases represent the preliminary "docking maneuvers" for final adjustment to the limits of tolerance in this area. Such delicate final maneuvers require above all things cool heads and steady hands. And in this context the heads and hands at work--for better or worse --are those of lawyers. To put it this way is not to minimize the danger in making miscalculations here; indeed, to pursue the analogy, it is precisely

in the docking stages that error is most magnified in effect and most dangerous. But it does serve to emphasize the profound difficulty of these decisions, and thus to make it a matter of normal expectation rather than of reproach that they should profoundly divide the court which makes them. How well the republic would be served if it were in this light that these fateful decisions of our day were understood by the citizenry. What a tragedy it is when lawyers and judges--whatever their professional attitudes about specific cases--fall in with unthinking condemnations which utterly fail to take account of the profound philosophical dilemmas posed by such cases.

Beyond this purely steadying influence which it seems to me lawyers owe the republic in these days, I would suggest two other duties of a more practical nature which now devolve upon the profession with particular force. Each involves strengthening the legal process for the task which, if one of the main theses of this talk be accepted, is now assuming absolutely new and decisive proportions in our national life.

The first has to do with law reform itself, on both the criminal and civil side, and in respect of procedure, substance and administration. I fully agree with what seems clearly the consensus of those of our profession best equipped to know--that in terms of priorities here the emphasis should probably be on the side of procedure and judicial administration. Public confidence in the speedy resolution of litigation is so obvious an ingredient in a healthy social fabric that its relevance to our theme needs no elaboration. I advance no particular brief for specific elements of reform; but rather, a more general suggestion, transcending the specifics. It comes largely from my own experience over the past decade working rather closely with the efforts in my state fundamentally to restructure our state court system and to update our civil procedure in the interests of a more expeditious administration of justice. Two attitudes about the legal profession emerge for me from this: unstinted admiration for a dedicated, creative minority which persists in the job; and very real distress at a large segment which simply opposes without any real inquiry into the merits. From this I am impelled to make a gratuitous suggestion to the bar about the law reform efforts: one should either participate actively in constructive and corrective support; oppose knowledgeably on the merits; or stand aside and accept the work of those creative, concerned elements in the bar which exists in every state.

The other has to do with the arrangements for the provision of legal services. One of the plain phenomena of the move into a more open society is the increased demand for legal services on the part of many people who simply have not known until the new openness of communication that they had problems which the law might redress. The scope of this demand and the nature of those involved poses a serious challenge to many of the traditional presuppositions held by the legal profession about proper arrangements for providing those services. We can respond basically in either of two ways. With the blind hostility bordering on collective paranoia which denies the need to inquire into any

presuppositions (as has a great sister profession) or, in the best traditions of our profession, by taking and retaining the initiative in a willing inquiry into all of our traditional attitudes in the light of the public interest of this day--not some other day. It will be to the everlasting glory of the profession, and to the profound benefit of our country if we do the latter. We ought do this whatever the consequences to private interests and concerns. But we can do it without any real fear of doing any hurt to legitimate individual or collective interests of the profession. The profession is on a sound economic basis. Its truly "legal" services are indispensible to society. The advent of group legal services and expanded legal aid not only are needed to meet the demand of this time, they will not have any detrimental effect on any legitimate interests of the profession if properly structured by a bar concerned for the public interest.

Now, if it can in good heart be said by one who has presented so generally somber a theme, a word of concluding optimism and faith and hope should be said. I can; and in good heart.

To the extent the legal profession itself has as critical a role as has been suggested, cause for great hope abounds. The profession is about law reform and is about investigating its presuppositions as to its public responsibility in unprecedented ways so far as I have experienced and otherwise know its history. Simply as representative, in the realm of law reform, I would point to the magnificent project of the American Bar Association to promulgate minimum standards for criminal justice. Who can gainsay the trauma we would have been spared in making the adjustments now being forced in this area by constitutional decisions if such standards had been evolved in state legislative codes? And who can fail to see the value of this effort for the eventual working out of the problems of final adjustment here at which we have earlier looked?

In the area of professional responsibility, I would point to the equally magnificent work of the American Bar Association's Special Committee on Evaluation of Ethical Standards. This Committee's proposed new code of professional responsibility does precisely the job of lawyer-like reexamination of our presuppositions as to the rendering of legal services which I have suggested the times demand. Such an effort is exemplary of the kind of initiative taking in defining the true public role of a great profession in a traumatic time which could set the pattern of citizenship the republic desperately needs. I hope most fervently that this work will proceed to consummation.

And last, a word of more general hope about the capacity of the republic at large to withstand the tremendous shock waves of adjustment we have tried here to understand. It can only be expressed in terms of hope--for on the view of things here advanced, all now finally depends on the stabilizing power of the law and on the fibre and enlightenment of the people--with the latter the final determinant. When we inquire as to the kind of fibre and general enlightenment which is going now to be required, we could do worse than listen to the words of one of our own great minds and hearts. Judge Learned Hand described that quality of enlightenment and commitment which must finally obtain as lying, "in habits, customs--conventions, if you will--that tolerate dissent, and can live without irrefragable certainties, that are

ready to overhaul existing assumptions; that recognize that we never see save through a glass darkly. . . ." And, he added: "If such a habit and such a temper pervade a society, it will not need institutions to protect its 'civil liberties and human rights'; so far as they do not, I venture to doubt how far anything can protect them; whether it be Bill of Rights, or courts that must in the name of interpretation read their meaning into them. . . ." If this be an accurate description of the quality which the social fabric must ultimately have in order to hold, then I can only express hope that we will indeed make it through this time. I cannot in truth say that there is detectable in my common pursuits among the populace any overwhelming evidence of such a basic commitment and such elasticity of mind and heart--whether on fishing piers or in general faculty meetings of a great University; at cocktail parties of the advantaged or in serious or casual colloquy with the disadvantaged; among the beleaguered Establishments of elders or among the thrusting sure under thirty. When I look for the leaven at least from which the loaf may be somehow sufficiently leavened, I come again to the lawyers. And can only say--not that they alone can or will provide it--but that if they don't, I don't see any better prospects around.

My hope rests at last on what may contain certain mystical qualities for which I make no apologies. I believe the founders built even better than they knew; that our structures have proven to have self-correcting qualities of fantastic resilience which will survive even these ultimate shocks of social adjustment; and, finally, with Herbert Butterfield, that Providence has a way of working through our institutions to make us better than we really are--even we lawyers.