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Law Day Address

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LAW DAY ADDRESS*

by

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I AM especially happy to be here because a lawyer cannot help being inspired at the dedication of such a fine new law library. It is not too much to say that a college or a law school is no better than its library, which should attempt to provide the students with the sum of man's knowledge in its field. The bricks and mortar that make up this building are symbolic of the pieces of information—the hard-won facts—which together make up the whole edifice of civilization.

This observation bears strongly upon the subject of my remarks today. As most of you know, at this time of year Law Day speeches are being made at law schools and before bar associations around the country. This year the Law Day theme established by the American Bar Association is, "Change Through Law and Reason." I thoroughly endorse this proposition. I would like to confine my remarks to one aspect of it, which is this: In the national dialogue and ferment that accompanies change, let us get the facts before we act. Law and reason cannot even spring to action except from a platform of facts.

It would seem unnecessary to utter this simple truism, except that so often today it is ignored in the most serious national issues. We find emotion and intuition in the saddle, while truth is trampled in the dust. As a nation we cannot continue on this retrogressive course without inviting grave dangers that so far we have generally avoided through a respect for the facts.

Most of you in this audience have been or are being trained in the law. You know that the practice of law is built on precise information—of which the rules of evidence are the most striking example. You know what the television character, Sergeant Friday, meant by his familiar plea during investigations, "Just the facts, ma'am."

Law schools have had the responsibility, among others, of instilling in their students this devotion to the facts. On Law Day may I take the liberty of reminding you that the hallmark of the lawyer is a healthy skepticism when confronted with broad conclusions—no matter how often they are repeated and no matter how generally they seem to be accepted. We lawyers must ask: "Who said it?" "Why did he say it?" "What is the proof?"

Lawyers schooled in this discipline also have a duty that goes beyond the courtroom and the law office. They have a responsibility, when their communities are embroiled in public issues, to promote among their fellow citizens this same devotion to the facts. It is a prerequisite for any sane and worthy resolution to public problems.

* Delivered at the dedication of the Underwood Law Library, Southern Methodist University School of Law, Dallas, Texas, on April 30, 1971.

I feel strongly about this because of the wild irrationality, the unfounded accusations, that have recently characterized some national issues. This refusal to hear the facts is not confined to any special element in American life. We find examples in the halls of Congress, on the campuses, in the news media—wherever public issues are debated. Let me give you two such examples:

Case No. 1—The Black Panther Genocide Fraud. In December 1969 the attorney for the Black Panthers, Charles R. Garry, stated publicly that police across the nation had murdered twenty-eight Panthers in “a national scheme by various agencies of the government” to “commit genocide upon members of the Black Panther Party.” With no proof whatever, a number of public figures repeated the claim of this biased source as though it were accepted fact. A state legislator charged that the scheme “was arranged by the federal police apparatus.” Soon the twenty-eight murders were reported as a fact, not as an allegation, by the *New York Times*, the *Washington Post*, and many other news media. One national magazine stated that the Department of Justice had joined the police and “escalated the drive” against the Panthers.

These were the charges—widely accepted and believed. Whenever our Department of Justice representatives met with campus groups, they would invariably be questioned about the twenty-eight murders and the genocide scheme. But what were the facts?

A few days after the Panther attorney's original charge, a *Chicago Tribune* reporter named Ronald Koziol exposed it as a fraud. But his story was ignored in the onrush of vilification against law enforcement agencies. More than a year after the original allegation, it was investigated by writer Edward Jay Epstein, who reported his findings in the *New Yorker* magazine of February 13, 1971.

With old-fashioned thoroughness, these two reporters independently started from the same base—the rather obvious journalistic step of requesting a list of the twenty-eight alleged murders. It turned out that twenty-eight had just “seemed to be a safe number,” according to Garry's own admission, and that the most names he could scrape together was nineteen. The investigators checked on each of these nineteen and as Mr. Epstein reported it:

One had been killed by a storekeeper in resisting a robbery, not by police.

One was shot in an argument with “friends,” not by police.

One was shot by his wife, not by police.

Another was executed by other Black Panthers, not by police.

Four were killed in a shootout with members of a rival black militant organization, not by police.

One was shot in an unsolved case, by a pistol later found in a raid on a Black Panther headquarters.

There were eight other cases which involved crimes or street shootouts,

in which the police believed they were dealing with criminals as such and had no reason to think they were encountering Black Panthers. Six of these Panthers were shot by policemen who were already seriously wounded and were fighting for their lives. According to Epstein's report, two policemen were killed and fourteen were wounded in the eight cases.

In only two Panther deaths were the police conducting a planned raid. One was killed as the police entered after he had fired a shotgun through the door, and the other appears to have been hit by a stray police bullet that went through two intervening walls.

Thus, no deaths can be attributed to what the Panther attorney called a "national scheme" of "genocide." The fraud has been laid bare, and to its credit the *Washington Post* made a full admission of error. But this is small compensation for the sorry spectacle of supposedly responsible public figures and the press repeating the most damaging charges without the facts.

The genocide fraud is a classic example of the triumph—hopefully, a temporary triumph—of the Big Lie over the Simple Truth. It operates on the old principle that if you tell a falsehood long enough and often enough, it becomes accepted as fact. I am reminded of George Orwell's *1984* and his language of "Newspeak," in which words assume opposite meanings—wrong becomes right, and fiction becomes truth. I believe that we Americans are not now, and never will be, ready to speak that language.

Case No. 2—The "No-Knock" Scare. I refer to a provision, supported by the Department of Justice, in the District of Columbia Court Reform and Criminal Procedure Act of 1970, and in the Comprehensive Drug Abuse Prevention and Control Act of 1970. It spelled out the circumstances under which officers making an arrest or searching premises with a warrant must announce their identity and purpose, and when they need not. In the latter case they must show a judge probable cause for believing that the suspect may destroy evidence, or attack the officers, or try to escape, if they announce themselves. If the judge is convinced he can then authorize the unannounced entry as part of his warrant.

When this proposal came before Congress it stirred a great hue and cry. Opponents labeled it the "no-knock" law. Many of them ignored the requirement for court approval. They conjured up images of Hitler's storm troopers kicking in the doors of their trembling victims. The provision was said to violate the fourth amendment against unreasonable searches and seizures. A former Attorney General was quoted in a newspaper interview as saying, "The no-knock law is immoral."

These were the accusations. What are the facts?

Actually, the provision gives more citizen protection, not less. Previously, under federal case law an officer about to make an arrest or search could decide for himself whether the circumstances justified his entering without announcing himself. In the District of Columbia, case law had

prohibited unannounced entry under certain conditions and indicated others in which the policeman could use his discretion in entering without announcing himself. In a majority of states this same latitude has been recognized either by statute or in case law, and in others such discretion has been practiced without specific formal guidelines.

In the case of *Ker v. California* in 1963, the United States Supreme Court upheld an unannounced entry to prevent the destruction of evidence. It took the occasion to declare that an officer should announce himself as a general rule, but it set forth specific exceptions in which he could decide not to announce himself.

In all of this prevailing practice and legal support, it was the officer who was given the on-the-spot discretion on whether or not to announce himself, subject only to possible later judicial review. But under the new D. C. and drug control acts, this discretion is taken from the officer and given to an independent judge, in the same manner that a judge decides beforehand whether there is probable cause for an arrest or search warrant. For the first time, this hazy area of citizen privacy has been clarified—and decidedly in favor of further protection to the citizen. In fact, the provision is more restrictive on the police than a similar provision in a draft federal drug bill proposed by the Department of Justice during the term of a former Attorney General—the one who now says the present law is immoral.

In short, citizen protection against “no-knock” entry is greater than it was before, but the Department of Justice is accused of inventing a new form of repression. Citizen protection means citizen repression in the “Newspeak” language of 1984.

These are only two public issues that arose out of a shocking contempt for truth and a cheap surrender to instinct. Nor do I blame the public, so much as the sharp erosion of professionalism among many who have the public's ear. Whether parents or students, the people are no better informed than the quality of their information sources. I am especially aware of this when I meet with student groups, and when Justice Department spokesmen join campus forums.

Time and time again students ask, “What are you doing about the concentration camps?”

Time and time again the patient answer is, “There are no concentration camps in this country, and if we can help it there never will be!”

The other day a Congressman, after claiming that the FBI tapped the telephones of Congressmen and Senators, offered the evidence that the telephone company reported that he had *no* tap on his line, but he said it always denies this when the FBI taps a line, and so the “no” report was really a “yes” report. Again, “no” means “yes” in the “Newspeak” language of 1984.

Despite the transparency of the Congressman's so-called information, despite the complete lack of evidence that the FBI has ever wiretapped

the phones of Congressmen, despite the Justice Department's unequivocal denial of the charge, the day after the Congressman's speech a student asked me, "Why are you tapping the telephones of Congressmen?"

At least I am glad to have the question, because it gives me the opportunity to compete with the student's own source of information—whatever that may be. I am happy to report that, time and time again, after getting the other side of the story for the first time, students have gone away with a different view of the matter. And I am also happy to say that this unfamiliarity with the facts is not particularly noticeable among law students, trained to dig out evidence from a variety of sources.

Ladies and gentlemen, let us recall that the advancement of man has been measured by his ability to discover and apply accurate information. Since the sixteenth century the rise of the scientific method of experimentation and proof has provided the basis for all the physical knowledge on which our technical capabilities stand. Beginning in the Middle Ages the development of trial by jury and the rules of evidence provided the same basis of fact in the world of law. All the major professions—science, medicine, engineering, accounting, and not least, law—have become true professions in proportion as they have come to identify, respect, and make use of facts.

Can we now allow ourselves, in our national decisions, to abandon fact in favor of emotion? We cannot, any more than the medical profession would revert to the age of the witch doctor, or our courts return to trial by combat.

Most especially I am gravely concerned that some of those who, in public debate, have shown the least regard for facts have been attorneys—those in whom the respect for facts should be ingrained to the very marrow. And we find courtrooms—where hard evidence and sworn testimony should alone rule the results—turned into theaters for histrionics and even violence. I am reminded of the somber warning of Roscoe Pound, writing two decades ago: "In jurisprudence we are dealing with experience developed by reason and reason tested by experience. The seventeenth and eighteenth centuries put their faith in reason. The nineteenth century, in the main line of its thought, put its faith in experience. The twentieth century has been putting its faith in intuition."

If this be the trend in our time, it is my fervent hope that it can be reversed before we as a nation follow it into some desperate mistakes. Rather, I would remind America's practitioners of law of that fundamental Latin maxim: "Ex facto jus oritur"—"The law arises out of the fact." "That ancient rule," Mr. Justice Brandeis told us, "must prevail in order that we may have a system of living law."