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The Growth of Awareness:

Our Nation's Law and Law Among Nations†

Each year American lawyers and American law schools join together on Law Day to celebrate the great ideal of Western civilization, that there are fundamental principles of law and justice that must be observed and also must be enforced against those who will not observe them, if free democratic society is to survive. On these occasions we think of law not as a set of rules but as a way of thinking about our society which, if followed, assures us of orderly progress in the face of industrial and social change. We do not celebrate real estate law, or administrative law, or the rules and regulations of the Securities and Exchange Commission. The kind of law we celebrate on Law Day is not a set of rules or specifically defined principles. At home it is a way of looking at society and the relations between individuals and their government. Abroad its most important aspect today is to restrain lawless international behavior and to prevent aggressive wars.

I. From Social Darwinism to the Warren Court—Growth of Awareness and Responsibility in Domestic Law

In the happy days of the 1920's, before the great Depression, everyone was certain what the fundamental principles of law which

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we respected were. So far as international law was concerned, we assumed that we had made the world safe for democracy by winning the First World War—a war to end all wars. We had saved England and the British fleet. We could safely draw back into our shell and assume that international law would take care of itself. Later I will talk about the consequences of that decision.

At home we assumed that we had at last achieved a perfect society that operated automatically provided that our legislatures did not interfere with certain automatic rules by passing radical social legislation which violated our past traditions of the proper function of legislatures. We knew that if private property was protected the automatic rules of something referred to as "Capitalism" would assure us permanent prosperity and the elimination of poverty and social discontent. Private property meant in those days the freedom of great corporate empires to do as they pleased. If these great empires were not interfered with, individual human rights would take care of themselves. Darwin's law of the survival of the fittest would solve the problem of weak and underprivileged individuals by eliminating them. The Constitution of the United States was there to save us from the folly of legislatures in the event that they were seduced by demagogues into an undue interest in human rights as against property rights.

These were the attitudes and ideals which were implicitly read into the Constitution of the United States and molded the decisions of the Supreme Court of the United States before the great Depression.

But unfortunately, the great Depression did not respond to our old traditions of constitutional law. It soon became apparent that social legislation of a kind heretofore unknown in our traditional thinking about the Constitution of the United States was essential to meet the desperate economic situation which confronted us. A conservative and embittered majority on the Supreme Court saw in that legislation a threat to every freedom that Americans cherished. The American Bar Association denounced as unconstitutional all efforts to put human rights above property rights.

By 1937 there was such a cloud of unconstitutionality cast by a bitterly divided Court over every New Deal measure that the administration of the New Deal program became impossible. Principles which are taken for granted today were then denounced by all right thinking persons as socialistic. The fog of unconstitutionality which enveloped the whole New Deal was so thick that no regulatory law

could be enforced until it had passed the scrutiny of the Supreme Court, a process which threatened to take years. Roosevelt was thus forced into a direct attack on the Supreme Court of the United States —the Court packing plan. I remember those days well. The fury of the educated citizens in the United States rose to incredible heights. Roosevelt was booed as an apostle of lawlessness by the students when he visited Harvard.

The Court packing bill came so near to passing that Chief Justice Hughes, who had been a constant dissenter from the decisions that had paralyzed the Government, was able to frighten the irreconcilable majority of the Court. Justice Van Devanter retired. Justice Roberts abandoned his extreme position and declared a new Agricultural Act constitutional.[1] It became no longer necessary to pack the Court. Out of the Court fight a new constitution emerged.

But its emergence was gradual. Over 30 years has passed, and the new constitution is not yet respected by a number of vociferous groups. For a period until the appointment of Chief Justice Warren a majority of the Court, under the influence of Justice Frankfurter, decided to play it safe. The Supreme Court stopped vetoing social and economic legislation. But the Court became a purely negative body concerned more with its own safety from public criticism than with the protection of the liberties of the individual citizen.

Under this protection Senator McCarthy rose to power. He frightened both the Truman and Eisenhower Administrations into establishing procedures by which citizens were tried and condemned as subversive on secret evidence without the American constitutional right of confrontation and cross-examination. Dorothy Bailey's conviction for disloyalty by a loyalty board on secret evidence was affirmed four-to-four by an equally divided Court.[2] From then on McCarthy had carte blanche. The Supreme Court had miserably failed in its duty. Every government official, indeed every teacher or writer, was made to realize that his career might be ruined and a badge of infamy pinned on him on secret evidence by faceless informers.

It was not until the appointment of Earl Warren as Chief Justice of the United States that our new Constitution began to be a positive force dedicated to the principle of human rights. I believe that Chief Justice Warren will go down in history with Marshall as one of the two greatest Chief Justices. As a result of the Court's

[1] Mulford v. Smith, 307 U.S. 38 (1939).
[2] Bailey v. Richardson, 341 U.S. 918 (1951).

decisions during his tenure, public servants can no longer be forced to take vague loyalty oaths which may later bring them into trouble because they hold unpopular opinions.[3] The government's vast "security" programs have been widely reformed and procedures substantially improved. The law has made us a more civilized nation.

We have also been made a more civilized nation as a result of the racial segregation cases.[4] Out of the bitter struggle which followed Chief Justice Warren's decision on school segregation the South is today beginning to accept the hitherto unpleasant fact that Negroes are citizens of the United States.

But perhaps the boldest and most successful principle ever to emerge through a Supreme Court decision is that voters in rapidly developing urban areas shall have an equal influence with voters in rural areas in determining state legislation.[5] Had the Supreme Court timidly refused to enforce the principle of One Man, One Vote—had it continued to declare this to be a political problem which could be solved only by an amendment to the Constitution—we would have been caught for the next twenty years in a rotten borough system where a minority could veto legislation adapted to the needs of the majority. State legislatures dominated by a reactionary minority of rural voters could never have solved the explosive problems of a growing urban society.

And with respect to the civil rights of individuals accused of crime the Warren Court has an equally great record, though often by five-to-four decisions. No longer can the police use a confession elicited from an indigent and mentally retarded person under arrest as a result of days of insistent questioning.[6] No longer can convictions be obtained where the accused is not represented by counsel.[7]

Thirty years have passed since Roosevelt introduced his Court packing plan. During that period the Supreme Court had first changed from a frustrating force hampering all government legislation to a purely negative institution which gave free rein to McCarthyism. Today a new Constitution has emerged protecting the civil liberties of citizens from the power of intolerant bigots, defending the right to a fair trial of indigent and ignorant persons accused of crime, and guaranteeing the right of a majority of our voters to prevail over

[3] Baggett v. Bullitt, 377 U.S. 360 (1963).
[4] Brown v. Board of Educ., 347 U.S. 483 (1954), 349 U.S. 294 (1955).
[5] Reynolds v. Sims, 377 U.S. 533 (1963).
[6] Davis v. North Carolina, 384 U.S. 737 (1966).
[7] Gideon v. Wainwright, 372 U.S. 335 (1962).

a minority in an election. The Constitution today resembles more closely the vision of the Constitutional fathers than it did before the Warren Court.

Nevertheless, this emerging Constitution has not yet been accepted by important minority groups who still want to impeach Earl Warren. Nor are the decisions of the Supreme Court universally respected by many of the intellectual elite who sit on law school faculties. Articles have been written by instructors at Harvard,[8] Yale [9] and the University of Chicago [10] complaining that the Supreme Court is not enunciating what they call neutral principles of constitutional law. On the other side we have the anguished cries of police chiefs and other citizens who want to suppress crime by denying certain procedural rights to criminal defendants.

Finally, we have the embattled minority of those who want to preserve the power of rural minorities to govern state legislatures through the rotten borough system. In 30 States resolutions have slipped past the legislatures to repeal the reapportionment decisions of the Supreme Court by calling a new constitutional convention—something that has not happened since the original Constitutional convention. If such a constitutional convention is called it will be an advertisement to the world that there is a struggle in America between those who believe in majority rule in a democracy and those who repudiate that principle under the doctrine of States' rights.

We need such a new constitutional convention about as much as we need more riots in our cities. And so I optimistically predict that even though enough States resolutions are passed to present the matter to Congress, Congress will refuse to take the ruinous step of calling a new convention in these troubled times. Certainly there are enough constitutional infirmities in these resolutions to justify Congress in ignoring them.

II. From Isolationism to Vietnam—Growth of Awareness and Responsibility in International Law

It is in the field of international law where the greatest danger lies. We are living in a lawless world, a world where small and relatively impotent nations can nevertheless start brush fires which may

[8] Hart, *Foreword: The Time Chart of the Justices, The Supreme Court, 1958 Term,* 73 Harv. L. Rev. 84 (1959).

[9] Bickel, *Foreword: The Passive Virtues,* 75 Harv. L. Rev. 40 (1961).

[10] Kurland, *Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,"* 78 Harv. L. Rev. 143 (1964).

spread to our own shores. We have seen it happen twice—the First World War and again in the Second. But the world is even smaller today than it was in the Second World War. It has become so small that lawless aggressive action by any nation against another can threaten world peace. It is also a world where poverty and misery in the crowded nations which cannot feed themselves threaten revolutions which upset the balance of power. In such a world we need some sort of a world constitution ever more desperately than the Thirteen Colonies needed the Constitution of the United States after the Revolutionary War. And the keystone of that world constitution is the principle that no nation must be permitted to expand its borders and its power through an aggressive attack upon its neighbors. We are today attempting to enforce that principle in Vietnam.

It was our feeling of desperate need for a principle of international law against aggression which led us to abandon our distaste for the League of Nations and become a leader in the formation of the United Nations. But this action we felt was not enough. We wanted some judicial sanction for that fundamental principle on which all international law must rest—the outlawing of aggressive war. And so, after Hitler's defeat, the United States joined with the victorious nations, including the Soviet Union, in the first Nuremberg trial to prosecute the national leaders of Hitler's empire. The paramount purpose of that trial was to declare that an aggressive war was an international crime which justified imposing the death penalty on the leaders of the nation which started it. The trials for German atrocities represented no novel principle. The great principle of international law announced for the first time at Nuremberg was that aggressive war is in itself an international crime regardless of the way it is conducted.

At the time of the Nuremberg trials those who write the think columns in our press, such as Walter Lippmann, and independent organizations of intellectuals, such as Americans for Democratic Action, and liberal professors on our college campuses, acclaimed the principle of the outlawing of aggressive war as a great step forward in international law. Today they are bending every effort to prevent the enforcement of the principle that Nuremberg announced to the world. They are giving every aid and comfort to the enemy that they can in the light of their limited numbers. They are encouraging Hanoi to believe that if it will only hang on the United States will abandon its attempt to enforce the Nuremberg principle in Asia.

They proclaim that America cannot and must not be a world policeman.

One only has to go back to the First World War to show the cost of American blood and treasure which has resulted from that attitude.

In the 19th Century and until the First World War England was the world's policeman. At tremendous cost the British fleet was kept to a strength larger than all the other navies in the world combined. In those happy days sea power was equivalent to world power. From the time of the Monroe Doctrine on we have been protected by the British fleet. But in the First World War we discovered that sea power was not what it once was. America had to be sworn in as deputy world policeman and go to the rescue of the chief. In fact, the necessity of assuming the role of world policeman had descended on us, but we were completely unaware of it.

When the First World War was over we decided that our obligation to enforce some form of international law in the world was over and done with. One of the favorite songs of the 26th Division, in which I served, went as follows:

> We have paid our debt to Lafayette
> Who the hell do we owe now.
> We don't want any more trenches,
> Lordy, how we want to go home.

We reduced our army from nearly 5,000,000 men to 200,000. We left a garrison of a few thousand men in the Philippines. By winning the First World War we had made the world safe for democracy. Germany had been taught her lesson. Japan had been our ally. To provide an adequate force to protect the Philippines might seem an offensive move against Japan. It might even lead to war. The United States should never commit an army to Asia, for the mere purpose of stopping aggression in the Orient.

Even in the 1930's when it became apparent that Japan was boldly embarking upon a course of aggression in the Orient, we refused to put any military obstacle in her path by reinforcing the Philippines. After all, we were not the world's policemen with responsibility for enforcing international law. Once attacked, the Philippines fell in only a few months and Japan was free to go on. Think of the cost of American lives that resulted from our attitude.

Even after the defeat of France by Hitler, the intellectuals who now are condemning our efforts to enforce the international principle

outlawing aggressive war failed to understand the role in international affairs which destiny had imposed on the United States.

A leader in that group was Walter Lippmann. His message today is that the United States has no responsibility in international affairs. It is not our duty, having announced the Nuremberg principle against aggressive war, to see that it is carried out. The President should admit before the world that our policy in Vietnam is morally wrong.

Mr. Lippmann believes in the futility of enforcing international law by American military force. His military advice is to use the army in Vietnam only for defensive purposes. He thought the same in 1940. I read from the Biography of General Marshall by Forrest Pogue:

> General Marshall was alarmed in late September when Walter Lippmann, in his widely read column, suggested that 'All popular doubts, political confusions, all ambiguity would be removed by a clear decision to shrink the Army and concentrate our major effort upon the Navy, the Air Force and lend-lease.' . . . . 'Today,' he argued, 'the effort to raise such a large army so quickly is not merely unnecessary but undesirable. . . .' He believed that the 'complex of circumstances' that centered on 'the great expansion of the Army' had become 'the cancer which obstructs national unity, causes discontent which subversive elements exploit, and weakens the primary measures of our defense, which are the lend-lease program and the naval policy. I think that a surgical operation is indicated—an operation to shrink the Army which will at the same time increase its efficiency.' [11]

This was after Hitler's successful invasion and conquest of France. Had Mr. Lippmann's advice been followed Hitler might have won the war. What he was saying in 1940 before Pearl Harbor, he is still saying today.

Mr. Galbraith, of the ADA, is quoted in the *New York Times* on April 3, 1967, as saying that the generals in Vietnam have not considered the political situation they are putting the Democratic Party in. He says: "But for the rest of us, there is no excuse for innocence. This disaster (i.e., a long war in Vietnam) could, indeed, mean the death and burial of the Democratic Party." In other words, the Democratic Party is more important than the enforcement of international law.

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[11] Forrest Pogue, *George Marshall: Ordeal and Hope*, Viking Press, 1966, p. 76.

Professor Feuer, who left Berkeley for the University of Toronto, refers in the *New York Times* Magazine, of March 26, 1967, to the vociferous group of intellectuals who are now giving advice on military strategy and reaching for political power through the ADA as the "alienated intellectual elite." He says:

> Among other elites or professions—engineering, law or medicine—mistakes of high magnitude would undermine the practitioner's standing. Not so among the intellectuals. The Intellectual Elite is least answerable for its mistakes, which tends to corrupt it. The mistake is hidden in the bibliography, lost among the footnotes. [p. 76.]

Henry Steele Commager, another of our alienated intellectuals, testified at the Senate hearings before Senator Fulbright in support of Fulbright's position. Professor Commager said:

> It is my feeling that we do not have the resources, material, intellectual or moral, to be at once an American power, a European power, and an Asian power . . . It is not our duty to keep peace throughout the globe, to put down aggression wherever it starts up, to stop the advance of communism or other isms which we may not approve of. It is primarily the responsibility of the United Nations to keep the peace . . . If that organization is not strong enough to do the job we should perhaps bend our major energies to giving her the necessary authority and the tools.[12]

Does Professor Commager mean what he says that we should give the United Nations the necessary authority to keep the peace, that we should make U Thant our deputy Secretary of State and provide the United Nations with the tools to keep the peace? In the Council of the United Nations Russia has an absolute veto. In the Assembly over a third of the votes are cast by impotent and infinitesimal sovereignties whose knowledge of world affairs is in rough proportion to their size. Does Professor Commager want us to turn our armies over to that disorganized group?

Senator Fulbright, another alienated intellectual, has written a book accusing the United States of arrogance. Is it arrogance for the United States to enforce international law not for our own selfish interests but in the interest of world peace? We are the only nation in the world capable of that task. Must we allow aggressive power to build up until it thinks itself strong enough to attack us as Japan did at Pearl Harbor? Is it arrogance when we permit ourselves to be lectured

[12] *The Churchman*, April, 1967.

by a Burmese citizen named U Thant, and instead of resenting this criticism encourage and cooperate with him in all his plans for a settlement in the hope that they are not as futile and impractical as they seem to be? Our alienated intellectual elite have no realization that international law, like domestic law, can only exist if there is force behind it. For example, Reverend Eugene Carson Blake, General Secretary of the World Council of Churches, in attacking our attempts to enforce international law in the Orient, comes out with this gem:

> "The more force we use the weaker become our best ideals." [13]

These people think we are engaged in a useless fight to establish a democracy in Vietnam. This is like saying that when the police put down a riot in Watts they are trying to establish democracy in that suburb. What we are fighting for is to preserve a principle of international law, without which there is no security for America in the lawless world.

Below the level of the more prominent group of alienated intellectuals we find those in academic circles who are not happy unless they are expressing their hatred of America. The following appeared in the *New York Times* Magazine of March 12, 1967. It was signed by seventeen members of the faculty of a respected institution, Western Reserve University:

> The appalling fact is that, by its actions in Vietnam, the American Government has forfeited any claim to moral superiority over the barbarism against which we are supposedly defending Western civilization. Messrs. Johnson, Rusk and McNamara—not to mention General Westmoreland—stand convicted, by their own words as well as their deeds, of crimes of war and crimes against humanity; and they do not even have the defense of the Nazi leaders at Nuremberg that the international laws against those crimes were ex post facto.

In a letter published in *The New Republic* on March 18, 1967, by a visiting professor at the respected Stanford University, where students apparently encouraged by faculty members did everything they could to insult the Vice President of the United States because he expressed his views before them, we find the following:

> I received calls from faculty members who, before the visit, had been unwilling to endorse the walkout, but who felt after that the only proper protest would have been for 1,700 of us to

[13] *Wall Street Journal,* April 27, 1967, p. 1.

> have stood in the auditorium and chanted 'Shame!' for the full hour.

Here we find a new phase of disrespect for law among our alienated intellectuals, the abuse of the right to dissent and the abuse of the freedom of speech. Much as I abhor the days when Senator McCarthy was in power, we did not in those dark times have to hear such nonsense from college professors. Now that they can safely publish their dissenting views without retaliation they have advanced a new doctrine of dissent based on the premise that dissent deserves special consideration, immunity from criticism and the right to shout down persons who disagree with them. In a democratic society dissent is not sacred. Only the right to dissent is sacred. Yet this simple principle of law has not yet been learned by some of the alienated intellectuals on our college faculties.

There is no use arguing with such people. They have no feeling for the fundamental legal principle of freedom of speech; they have no sense of reality. I prefer to dismiss them with a verse from Kipling who was the poetic spokesman for British international policy:

> The poor little street bred people who vapor
> and fume and brag,
> They are lifting their heads in the stillness to
> yelp at the English flag.

I used this quotation before another college audience some time ago. At a small group meeting afterwards I was accused of interfering with freedom of speech of those who sincerely believe that the Vietnamese war was a moral atrocity and an international crime. I replied that I would defend their right to say it was but they ought to defend my right to say they were yelping at the flag. Did I get my point across? The answer is, No. Freedom of speech to them meant more than the right to speak, it meant freedom from harsh criticism; it also included the right to obstruct traffic.

Returning to the principle of international law that I am defending here tonight, i.e. the duty of the United States as the richest and most powerful country in the world to enforce the law against aggressive war, it is my belief that the majority of American citizens of both parties believe in that principle. I think they have learned the lesson that—in our present age—it is the function of a dominant world power to take the lead in establishing world order and enforcing international law, and that a disorderly consensus of bickering lesser powers such as the United Nations cannot now do the job. This role

imposes a costly burden in lives and money. But how much more costly we found it not to defend ourselves against the aggressive attempts of Japan to dominate the Orient until, encouraged by our lack of defenses in the Philippines, Japan felt confident enough of our weakness and irresolution to attack us at Pearl Harbor!

Gilbert and Sullivan were no doubt right when they composed the song "Taking One Consideration With Another, a Policeman's Lot is Not a Happy One."

But we have been forced as the result of the inevitable march of events to choose Vietnam as the place to demonstrate to the world our adamant policy in favor of peace against the uninhibited building up of empires by outside aggression.

I am one of those who believe that if we had not taken our stand in Vietnam, then Korea, which we have built up as one of the few strong economies in the Orient, would have become disillusioned and felt itself in danger. I believe we saved Malaya and Thailand. I believe that the present disorder in China and the growing weakness of the Chinese, heretofore aggressive, would not have taken place had China's onward march through Asia not been stopped in Vietnam.

But whether I am right or wrong, this much is clear: America cannot afford to adopt an irresolute and vacillating policy in international affairs. If we do, our enemies can never be convinced that we mean what we say. Harry Truman was forced to risk a war with Russia in order to convince the Russians that we meant what we said about Berlin. Kennedy had to risk an atomic war in order to convince Russia that we meant what we said about Russia maintaining atomic bases in the Western Hemisphere. The war in Vietnam, disheartening and bloody as it is, has far fewer risks. The greatest risk is to apologize and back down.

Our alienated intellectuals do not have the courage to say we should withdraw, a position I would respect however wrong it may be, Instead they think it is their function to stir up all the dissatisfaction and dissent they can and to do their best to portray the United States to the world as a stupid and brutal power unnecessarily killing thousands of people and burning villages. Their military advice is to stop shooting the enemy on the theory that if we did the gratitude of the enemy would be so great as not to take advantage of us.

It may be true that generals are not safe political advisers. But that does not mean that alienated intellectuals are safe military advisers.

Since the days of Secretary Dulles and the McCarthy era we have made one giant step toward the establishment of international law. In those days we felt it was our duty to oppose Communism with a big C. We were afraid of the infiltration of ideas. We encouraged wars of liberation in East Germany and in Hungary which were in essence revolts against the established sovereignty. Then when the citizens of a communist country did revolt, as they did in Hungary, we promptly let them down.

It is not the function of international law to reform independent sovereignties and to conduct war on Communism or any other ism. For the first time since the World War we have affirmatively recognized that principle. We are bending every effort to establish relations with communist powers. We conceive it today as our duty to get along with them. We are willing to recognize a communist government in Vietnam if it is not achieved by aggressive military force from the outside. We have stopped our policy of trying to inhibit the flow of radical ideas. This is a far cry from 1950 when the Government spent hundreds of thousands of dollars to convict Owen Lattimore because he had pointed out that the Chinese revolutionary government was a force to reckon with and to get along with. Neither an international policeman nor a local policeman should be concerned with arresting people because they had false ideas of government. If we succeed in outlawing aggressive war, then we need not be concerned with whether or not communism spreads by non-violent means.

The function of law, both domestic and international, is to suppress disorder and aggressive conduct which disrupt the processes of peaceful change and adjustment. If international law fails in this function there is no limit to the spread of disorder and violence and eventual war.

Our responsibility as guardian of the principle of international law will be a costly burden to us but it is nonsense to say that we do not have the resources to carry it. The burden on England in the 19th Century was infinitely more costly in terms of the economy of that time. To say that we do not have the resources to enforce international law against aggression and at the same time take care of poverty at home is nonsense. We not only had the resources to fight the Second World War, but we actually got rich in doing so. We went into the war in a period of depression; we came out of the war richer in terms of productive capacity than we had ever been before.

It is, after all, productive capacity that is the real wealth of a

nation. Since World War II our economy has grown in terms of goods and services to produce $547 billion in 1960 and thence up to $750 billion in 1966. It is predicted that in 1970 our national product will amount to over a trillion. In terms of percentage of the gross national product our defense budget was costing us as of January of this year less than it did in 1960 when there was no Vietnamese war. The defense budget was 9.1 per cent of our gross national product in 1961. It had fallen to 8.9 per cent at the beginning of 1967. We have today, in spite of the war in Vietnam, more production—and a greater share of our production—to allocate to the war on poverty than we did five years ago.

There is no reason why we cannot carry our international burden and at the same time promote economic progress at home. We must do both. Today there is no safety at home in a lawless world. If we allocate the tremendous power of productive expansion with which the modern scientific revolution has endowed us to these two ends, the international law of the 20th century will be the gift of the United States to the world.