

Remarks by Honorable Frank M. Coffin
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U.S. Court of Appeals for the First Circuit
On the Occasion of Law Day
Rotary Club, Waterville, Maine
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A Charter for All Seasons

If the celebration of Law Day is intended to compete with its Communist counterpart, May Day, it has a hard row to hoe. Law Day commemorates no single dramatic historical event or person. Its name is far more grim, neutral, and metallic than its cousins - Mother's, Father's, Patriots, Thanksgiving, or even Labor and Arbor Days. It does not lend itself to parades and mass meetings.

In any event twenty minutes are hardly enough to do justice to the concept of ordered liberty which is the underpinning of our entire society. All we can hope to do here is to indulge in the luxury of a few thoughts we don't have time for when we scan the headlines or give our opinion. For we are a very liberal people with opinion.

A foreigner, listening to us, must think we are all very wise. Each one of us knows what the city tax rate and school budget should be, how state government should be organized, what the federal government should do and what states should do, how to stop inflation without recession, and how to handle most foreign affairs, except Vietnam. Most particularly, we know how the law should operate. We know that the police should be able to question anyone in the absence of a lawyer, or eavesdrop, or search a man's clothing, car, or house for incriminating evidence; that the guilty should be forthwith convicted without letting smart lawyers raise their technical objections and drag out appeals from one court to another at our great expense; and that the only safe place for anyone convicted is prison. We say this because society has its rights, too, and we happen to be society. Of course, if our bookkeeper forgot to post some sales to our receipts ledger and a Treasury agent began to snoop around our office, we'd call our lawyer in a hurry. And if we found out that that agent had bugged our conversation, we'd be furious. But that, of course, could never happen to us.

Well, this is the way we carry on. A foreigner might be misled by us but we aren't. We enjoy giving opinions. We enjoy it so much that we hate to be restricted to those we really believe in. And yet - there are times when we do well to pause a moment and ask ourselves what we really do believe. Today is one of those times, not just because we call this a Law Day program, but because this is a time of warfare, strong feelings, high stakes, and no end in sight. And in such times, if we let it, the worst in us comes to the surface and we say violent things without caring whether we really believe them or not.

So we might use these moments well by looking backward at the road we have travelled, looking at where we are, and taking a glimpse into the future.

We could of course go back to the code of Hammurabi, for some of our concepts of the law are as old as recorded history. A closer date, brought closer to our times by that fine motion picture, "A Man for All Seasons", is 1535, when Sir Thomas More refused to approve Henry VIII's marriage to Anne Boleyn or to acknowledge Henry as head of the Church in England. Sir Thomas, loyal to his sovereign but also loyal to his God, chose to remain silent "according to the

dictates of my conscience". His trial, his recourse to his right of silence, his conviction on perjured testimony, and his execution for the "crime" of denying the King's authority in matters of religion were only one of the hideous examples of the rule of men, not of law, which characterized the dark 16th and 17th centuries of English history. Thomas More was at the head of a long parade which led, 243 years later, to our Bill of Rights.

When, in the summer of 1787, fifty-five delegates met at Philadelphia at the Federal Convention, as it was called, they were well acquainted with Thomas More and scores of other victims of Star Chamber justice, from the books and pamphlets in Ben Franklin's Library Company and from their own libraries. Those Founding Fathers were a rare lot. Patriarchs they were not. As those of you who have read Catherine Drinker Bowen's "Miracle at Philadelphia" know, it took Franklin's 81 years to raise the average age to 43. Hamilton was 30; Madison, 36; and John Adams, 37. They assembled qualities of mind and spirit hard to duplicate in any age. They were young but knew responsibility; they were men of affairs but had a throbbing liberty nerve; they were men of strong views, but enough of them were flexible to make agreement possible. And, though their aim was to conserve in law what they had won in war, they were radical enough to exceed by far their limited instructions to revise the Articles of Confederation. And so, in forging a new federal government, they committed, in Martin Van Buren's words "an heroic and lawless act". To use the appraisal of the British-born philosopher, Alfred North Whitehead:

"The men who founded your republic had an uncommonly clear grasp of the general ideas that they wanted to put in here, then left the working out of the details to later interpreters, which has been, on the whole, remarkably successful. I know of only three times in the Western world when statesman consciously took control of historic destinies: Periclean Athens, Rome under Augustus, and the founding of your American republic."

Before the long, hot summer was finished, these men had hammered out their historic work. But fatigue had set in and the Convention closed by rejecting a bill of rights as superfluous and by debate of a proposal to defer everything to a second convention. The delegates went home and the states began to vote. It is hard for us today to imagine that such a thing as our Constitution was debatable. But the country was far from united. The antifederalists, including such heroes of the Revolution as Samuel Adams and Patrick Henry, had much to work with: distrust between seaboard and backcountry, between north and south, between farmers and cities; fear of a Vice President, of a national army, of a Federal City ten miles square from which would sally forth troops to enslave the people; violent opposition to the taxing power; and lack of a bill of rights.

Five states - Delaware, Pennsylvania, New Jersey, Georgia, and Connecticut - ratified solidly, but not without bitter debate. Massachusetts was a different story. And the province of Maine supplied most of the opposition. We had mixed motives. There was a strong libertarian feeling expressed by Thomas Wait, publisher of the Cumberland Gazette. He wrote that "There was a certain darkness, duplicity and studied ambiguity of expression running through the whole Constitution which renders a bill of rights peculiarly necessary." Others, intent upon statehood, felt that the Constitution would be a roadblock. Catherine Bowen termed the Maine delegation "a truly oratorical" one. There was General Thompson, who condemned the Constitution for not outlawing slavery and said of Washington, a slave owner, "He is still for self, and in my opinion, his character has sunk fifty percent." Another was Samuel Nason, a saddler from Sebago Lake, who, after his town first decided not to send a delegate, to use the words of a neighbor, "come

down charged with Gass and Stirred up a 2d Meeting and procured himself elected, and I presume will go up charged like a Balloon." A third combatant was William Widgery, an eloquent foe of the taxing power. The final vote came after a month of invective and argument. It was scarcely overwhelming: 187-168. There were still three states needed to make the minimum number of nine. And Virginia and New York were critical. The vote in Virginia was 89-79 and in New York 30-27. Upon such slender margins depended all hope for that "more perfect Union".

Although those 55 statesmen had wrought well, they had not wrought well enough. The country insisted on a bill of rights and the First Congress had to finish the Job. The story of that Congress is just as fascinating as the story of the Constitutional Convention. But that must be left for another day, as must the evolving history of Constitutional interpretation by the courts.

The purpose of all this looking backward is that we may look at today and tomorrow with clearer vision. Or, to put it another way, to be a bit historical is a good vaccine against becoming a bit hysterical. For today, as in every era, we question the applicability of some of these historic rights. We view with justified alarm the rising amount of crime, delinquency, and addiction. It is tempting to say that it is time that the pendulum should swing back to give society more protection against the lawless individual. If this is the deliberate, well thought out, and dispassionate view of the people, taking into account the hard-won victories of the centuries and our aspirations for the distant future, and if it is not the product of transient fears and frustrations, then - and only then - should we think in terms of federal Constitutional amendments.

Long before we reach that point we should take a long, hard look not only at the past but at the world in which we live and the problems it has created. The first hard question is whether the pendulum has significantly altered the balance between all of us - society - and one of us - the individual. We shall not be able to answer this question on the basis of our present knowledge. There are 40,000 separate police jurisdictions reporting crimes. They vary in their effectiveness in their reporting. There are now and always have been more crimes than we know. The President's Commission on Law Enforcement and Administration of Justice tells us that one out of three burglaries is reported, one out of two aggravated assaults and larcenies, two out of three robberies. Until we develop a better system of measurement we simply cannot talk with precision about the crime rate.

But, even as to crimes we know about, we should be slow to say that criminals are having a field day under the new Supreme Court decisions. Our federal statistics show that, of 33,718 defendants in criminal cases before our 88 United States District Courts in fiscal year 1965 - a one per cent increase over the previous year - 85.3 per cent were convicted. This figure is practically the same as that for the previous year - this despite the Escobedo decision. While the returns are not all in, certain important precincts have been heard from. In Michigan, New Jersey, and Los Angeles, no significant change in the rate of confessions has been noted after the police began to give the full range of warnings of the rights of silence and of counsel. And a week ago yesterday the Attorney General reported that in New York, even after the Miranda case, in only one case out of a thousand was a confession suppressed by a court. The Attorney General added that confessions were coming in at perhaps an even higher rate than before the Miranda case - what some describe as the high water mark of coddling criminals.

But we still have a problem. It is not the kind of problem that is solved by relieving courts of the duty of applying the Constitution. It lies in the ominous fact that, according to the President's Commission on Law Enforcement, one boy in six is referred to the juvenile court, and that forty per cent of all male children now alive in the United States will be arrested for a non-

traffic offense during their lives. This fact and this prediction should wake us up to the realization that the job to be done is just too big to assign it to any one institution. If we await the event, what shall it profit us, with all the unrelenting toughness in the world, to see forty per cent of our manhood behind bars or paying fines?

This is where the pendulum is swinging against society. But it is swinging, not because of the way in which the courts are interpreting the Constitution but because we have more people, bigger cities, more temptations, more problems. But we also have more knowledge, more trained specialists, more wealth, and more ambition to solve these problems. What we lack is the recognition that we have to pay a price for civilization, that as the quality of civilization goes up, the price goes up. At the moment we are paying, strange as it may seem, a bargain basement price. Of all the nations of the western world, we are fourth from the bottom in the total taxes per capita we pay for our particular civilization - even with the burden of Vietnam.

The President's Commission makes seven suggestions, all of which cost money. The first is investing in crime prevention and in reducing criminal opportunities. This involves everything from better slum schools to miniature two-way radios for police and automatic key ejection devices for automobiles. The second recommendation is a broader range of ways to deal with offenders, including community Youth Service Bureaus, community-based half way house correctional centers, and community programs for the public drunk, who accounts for one out of every three arrests. The third proposal has to do with the courts and the police - criticizing cramped, noisy courtrooms, poor personnel, excessive caseloads, and "assembly line justice". The Commission recommends lawyer service for both juveniles and adults faced with serious charges, the elimination of money bail for those who can be trusted to appear at court, and community relations machinery for the police.

The fourth proposal seeks ways to attract and retain the well educated in the ranks of the police - of whom 50,000 new recruits are needed this year to fill vacancies; to take judgeships out of partisan politics; to double the number of juvenile probation officers, triple the number of adult probation officers working with persons convicted of felonies, and increase sevenfold the number of probation officers working with those who have committed misdemeanors. The remaining planks in the anti-crime platform are research - to bring the figure well above the present one per cent of the criminal justice system's budget; the provision of adequate municipal, state, and federal funds; and the increased involvement of states, universities, churches, welfare agencies, unions, businesses, and - in a word - of the individual citizen.

If we are depressed at the Job still to be done, let us take still another look. Not at the past, the present, or our future task, but how others see us. As other nations, particularly from that vast world of developing countries, see us, where else can you see people secure in the title of their homes, able to rely on a contract, having the right to a good common sense jury, having the services of the best lawyers even in unpopular causes, police who take seriously a Supreme Court mandate, judges who know no fear nor favor in their decisions, courts where a little man without counsel can sometimes win against a big corporation, a country where a despised murderer is nevertheless given a meticulously fair trial?

Justice is the end and object of any civilization. It can never be perfectly achieved. But, across two small but hectic centuries in the life of this nation we have a good claim that we are working with a charter for all seasons.