Remarks by the Honorable Frank M. Coffin
U. S. Circuit Judge,
U. S. Court of Appeals for the First Circuit,
at the
Rotary Club Law Day, Portland, Maine
April 29, 1966

Some Reflections on the Roots of Rights

On this Law Day of 1966, we find ourselves as a nation intensely involved in the effort to protect and enlarge individual and minority rights. The civil rights of Negroes, the procedural safeguards for the accused criminal, the adequate legal representation of the poor, and the effective legal treatment of the juvenile delinquent, the drug addict, and the mentally afflicted have stirred interest, conscience, controversy, and action. Even the rights of the non-believer, the communist, and the merchant of pornography have been the focus of judicial inquiry and. public comment. Now rights to travel and to marital privacy have been judicially recognized.

This era undoubtedly ranks with those immediately following Independence and the Civil War in the extent and depth of national concern over the protection of the rights of individuals. But with this concern comes apprehension about the ability of society to adjust to these rights. We are troubled about the magnitude of crime, the human and material resources required for effective law enforcement and the institutions and services needed for the misfit, outcast, disabled, underprivileged, and criminal. And we are tempted, in the vortex of controversy, to say that we are carrying too far our concern for the individual, that in our libertarian zeal we are departing from the delicate balance struck by our Founding Fathers between the rights of the majority and the rights of minorities.

So, on this day which we set aside to acknowledge one of civilized man's most priceless possessions - a rule of law not of men - I can think of no better kind of commemoration than a few reflections on the roots of the rights we possess, and what was in the thinking of the architects of our Constitution.

To begin with, if anyone were to ask us to name the foundation principles of our republic, I wonder how long it would take to sift the primary from the secondary and arrive at a basic list. Since everyone is entitled to his own, here is mine - a list of five. First - the right of the majority of citizens to determine their political and economic course of conduct. This includes the right to amend the Constitution and even to change the form of government. It also includes the limited right of the people's representatives in Congress to determine their own privileges free of harassment by the executive or the courts. Second - justice as a goal of society, the equality of men before the law, or, to put it another way, the protection of minorities, including a minority of one individual. Third - the diffusion and balancing of powers both as between the federal government and the states and as among the three branches of government. Fourth - the principle of judicial review, based upon an independent judiciary and its power to declare "the supreme law of the land". Fifth - a written Constitution. The mere fact that our Constitution is written we take for granted. But this was a departure from British precedent which hallowed an unwritten constitution. Our forefathers knew and profited from English history. They knew that Magna Carta itself, not being part of the unwritten constitution, had to gain its force by being enacted by Parliament no fewer than 32 times - meaning that it had fallen out of the constitution 31 times.

All five corner stones are needed to support the humanized society which is our ultimate object. With rule by a monarch, dictator, or oligarchy foreclosed, we seek to avoid the excesses of rule by the majority through establishing rights of individuals, set forth in writing, protected against encroachment from either the executive or legislative power, by an independent judiciary sworn to uphold the Constitution.

Beyond the rights established by these principles, there are others. We do not begin to recognize their extent. Most of us would probably think only of the first ten amendments. But in truth the Constitution itself went far toward being a Bill of Rights. Apart from the 9 or 10 rights contained in the basic principles already discussed, there are 17 in the original Constitution, no fewer than 30 in the first ten amendments, and 9 in the post-Civil War amendments to date. This is a total of over 60 specific rights vouchsafed to us by the Supreme Law of the Land.

If we can be called a libertarian people, our Founding Fathers, accounting for five sixths of our rights, were profoundly libertarian. In recalling our heritage, it is important that we remember two looming realities. Those who drafted our Constitution carried forward liberties painfully extracted from English sovereigns over a period of six hundred years. But they did not stop at this, for the American Revolution was not merely a territorial secession from the British throne; it fought for and enshrined certain rights that had never been durably won by the British people.

The large tapestry of English history provided the unspoken frame of reference for the Constitution makers. This is in large measure the story of Magna Carta - not the story of the document itself but of the way in which, despite itself, it came to stand for rights far beyond that limited contract between a king and his privileged barons. The Great Charter spoke in terms of preventing the deprivation of "liberties" and "free customs" except by judgment of one's "peers" or by "the law of the land". No matter that this was first a contract only with the Barons, nor that "liberties" meant property rights received from the king, nor that "free customs" meant the right to levy tolls, nor that "peers" meant social equals, nor that "the law of the land" meant a trial by battle or trial by the ordeal of a red-hot iron. Shrouded in antiquity, mired under bad scholarship for centuries, Magna Carta became the the consistent weapon of those who would trim the king's power. And always at bottom it stood for the proposition that there was a law above the king.

Over a hundred years later, the slow shift of power to the Parliament and the broadening of concern over individual rights resulted in the first statute to prohibit expropriation, imprisonment, or death except by "due process of law". But this was only a statute, not part of a constitution. And this advance proved only temporary, for the reign of Tudors and Stuarts produced a two century eclipse in which the legal firmament was lighted chiefly by the baleful glow of the Star Chamber and the Court of High Commission with the rack, the gibbet, and the Tower as the chief instruments of justice.

All this was history in the large for young men in colonial America. But there was more. There were little histories as well known by Madison, Hamilton, Franklin, and their colleagues as the Boston Tea Party is known by us. There was a ten volume set of Emlyn's "State Trials", setting forth in detail the great English trials of more than a century. And there were some 63 pamphlets publicizing political prosecutions during the two dark centuries. All of these were in many American libraries and particularly on the shelves of Benjamin Franklin's Library Company of Philadelphia - the unofficial Library of Congress in Carpenters' Hall.

Here was Sir Thomas More who, in 1535, had been asked to legalize the second marriage of Henry VIII and recognize him as supreme head of the Catholic Church in England. As to the first question, he had the option of saving his body or his soul. He chose his soul, using the

phrase, "according to the dictates of my conscience". Over 400 years later the Virginia Declaration of Rights used the same words. As to recognizing Henry head of the Church, he chose silence, saying, ". . . no . . . law in the world can punish a man for his silence . . . ; 'tis God only that is the judge of the secrets of our hearts." And this is just as contemporary as the cases currently being pondered over by the Supreme Court.

Then, in 1590, came a man of the opposite faith, John Udall, a stubborn Puritan minister who was charged with writing booklets aimed at reforming the articles of worship. He refused to testify against himself. His trial, as Irving Brant observes, "reads like a Bill of Rights in reverse." Compulsory self-incrimination, violations of freedom of religion, freedom of the press, right to counsel, right to face one's accusers, right to present witnesses, right to bail, right to fair instructions to a jury, building a new crime on a presumption of guilt from an inference from an unproved remark, reaching a verdict six months before trial, and denying the jury the right to decide if a felony or a misdemeanor had been committed -all were present . . . and remembered.

In 1634, following the Puritan Udall and the Catholic Sir Thomas More, came the straitlaced William Prynne, who was disturbed about the lascivious influence of the stage and made the mistake of putting his prejudices into print. The book was unfortunate enough to come off the presses six weeks after the Queen of England saw fit to appear on the stage. One chapter was infelicitously entitled, "Women Actors notorious whores". The Star Chamber refused to brand him in the forehead and have his nose slit, being content with two pillories, the cutting off of one ear in each, a fine, and life imprisonment. Here was other grist for the constitutional mill as those early Americans reflected on ex post facto laws, grand juries, trial by jury, compulsory self-incrimination, and cruel and unusual punishments.

Then, three years later, came one of the most famous litigants of all times, John Lilburne. He was dragged to Star Chamber for having brought in books from Holland promoting Puritan dissent. When asked to swear that he would answer all questions put to him, he made a reply which has resounded over three centuries: "I know it is warrantable by the law of God, and I think by the law of the land, that I may stand upon my just defence, and not answer to your interrogatories; and that my accusers ought to be brought face to face, to justify what they accuse me of." Not only was self-incrimination involved, but freedom of religion, speech, and the press. He was gagged at the pillory and whipped 200 times from Fleet Street to Westminster. But his case provided the impetus that led Cromwell's Parliament four years later to end the fateful history of the dreaded Star Chamber.

Finally, in 1670, came the twin cases of William Penn and a juror named Edward Bushell. Penn, being forbidden to preach within any building, preached to a quiet group of Quakers on Gracechurch Street in London. He, with a listener named Mead, was indicted for speaking "to the great terror" of the people and the disturbance of the king. Penn and Mead entered the courtroom bareheaded. The Mayor ordered their hats to be put on. The Recorder subsequently fined them 40 marks apiece for keeping their hats on. The two culprits were then banished to the Black Hole and the jury was charged to return a guilty verdict of unlawful assembly if they found so much as that Penn had preached. The jury found only that he had preached but refused to find any unlawful assembly. Juror Bushell was scolded by the judge, and the jury was kept all night "without meat, drink, fire, or . . . so much as a chamberpot though desired." They held firm. Penn and Mead went to Newgate prison for having obeyed the court in putting on their hats and the twelve jurors went for failing to convict the two Quakers as ordered.

Here, in this small book-shelf of cases, was a good part of both our Constitution and Bill of Rights: the law of treason, self-incrimination, right to counsel, right to speak and to be silent,

protection against illegal search and seizure, freedom of religion and of the press, right to confrontation of witnesses and to present witnesses, right against excessive bail, right to indictment by grand jury and trial by jury, and protection against cruel and unusual punishment or ex post facto legislation.

The Constitutional Convention of 1787, when it came to setting forth rights of individuals, devoted most of its debate to what should be required to prove treason. Very little or no debate sufficed to outlaw bills of attainder, titles of nobility, and ex post facto laws; to establish habeas corpus and trial by jury; and to assure equal privileges and immunities in the several states and guarantee a republican form of government and protection against rebellion to the states.

In the fatigue of the closing hours, a technical, dry, legal discussion triggered another historic series of events. Someone proposed that jury trial should prevail in civil cases. Nathaniel Gorham of Massachusetts replied that this was too broad, for it would include equity cases to which jury trials did not apply. Then George Mason of Virginia (who had been instrumental in drafting Virginia's Declaration of Rights) observed that the Constitution should be prefaced by a bill of rights which, he thought, could be based upon the state declarations of rights and be drawn in a few hours. But this was turned down as was a proposal by Gerry of Massachusetts that freedom of the press be assured. It was too late and delegates were tired. The Convention adjourned and all went home. The States then began the process of ratification.

Who would have predicted, so soon after such monumental and exhausting labors, that a Bill of Rights could be added within another year? But the American nerve was still vibrating. All English rights had been carried forward, but there still remained those other rights for which the colonists had fought - freedom of conscience and religion, freedom of the press, and freedom of speech. These were beyond things English. They ought to be guaranteed to Americans.

While some states ratified quickly, the keys to the future lay with New York and Virginia. And particularly with James Madison. After he returned from five months work with Hamilton on the Federalist Papers, he accepted Mason's list of fourteen of Virginia's twenty articles. When Congress opened, and he sought to debate them, the usual parliamentary roadblocks were met. Some advised that state bills of rights were sufficient. Others said the matter should be studied for a year. Finally Madison saw a friendly committee appointed to consider the amendments. But when he brought the committee's report to the floor in August 1788, he ran into trouble.

Sedgwick of Massachusetts waded into the first amendment, pointing out that it was ludicrous to secure the right of assembly as well as the freedom of speech, since speech necessarily involved assembly. Benson of New York replied that these rights were conceived as inherent and that statement of them was to provide against their infringement by government. To which Sedgwick answered with honed sarcasm: "If the committee were governed by that general principle, . . . they might have declared that a man should have a right to wear his hat if he pleased; that he might get up when he pleased, and go to bed when he thought proper; but he would ask the gentleman whether he thought it necessary to enter these trifles in a declaration of rights, in a Government where none of them were intended to be infringed."

To us this might seem like an unanswerable argument. But the argument was answered in what is probably one of the most crushing, if hidden, rejoinders, which parliamentary debate has to offer. John Page of Virginia, whose father, Mann Page was one of eight American subscribers to the ten volume edition of English "State Trials", replied: "The gentleman from Massachusetts . . . objects to the clause, because the right is of so trivial a nature. He supposes it no more

essential than whether a man has a right to wear his hat or not; but let me observe to him that such rights have been opposed, and a man has been obliged to pull off his hat when he appeared before the face of authority; people have also been prevented from assembling together on their lawful occasions . . . . If the people could be deprived of the power of assembling under any pretext whatsoever, they might be deprived of every other privilege contained in the clause."

To every member of that Congress, this invoked the memory of that trial 118 years ago when William Penn was told to put his hat on and then fined and imprisoned for not taking it off. No oratory was needed. Sedgwick's motion to delete the words relating to the right of assembly was lost "by a considerable majority".

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Apart from Sir Thomas More and William Penn, and possibly John Udall, I doubt that we would particularly like the rest of these l6th and 17th century characters. Prynne was a prude. Lilburne was a troublemaker. But they all contributed to the march of free men in our country more than in their own.

It is important not to take these liberties or the idea of liberty for granted. Our forefathers did not. They had brooded over six centuries of English history and nearly two centuries of colonial history. They considered that the Revolution had been fought as much to win these liberties as to win independence. Having won independence, they meticulously set forth to reduce them to writing. And having done their best in the Constitutional Convention, they realized that the best was not good enough. And so they returned the next year to finish the job. And they did so, not in terms of mild exhortation, but in a series of ringing mandates beginning "Congress shall make no law respecting an establishment of religion ... or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble . . . ."

The tree of liberty can be refreshed by other means than by the blood of tyrants. For us it can best be refreshed by remembering whence came its roots, and how it grew. To the extent that this heritage lives in our memory, we can be trusted to grapple with the problems of our time in the spirit in which this nation was created.