Remarks by Honorable Frank M. Coffin
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# The Dark Side of the Law

The mixture of tradition, rules, institutions, and people that we stuff into one of the shortest words in our language and call the "law" has many sides. For centuries it has been a fount of humor and satire. The law also has a full measure of pathos and heartbreak, as any citizen who has been a juror in a personal injury case can testify. And it has its highly technical, super-complicated side, as cases in patent, tax, and anti-trust fields amply demonstrate. It has all these sides and more because human nature does. For the law is one way of attempting to deal with human nature in organized society.

And just as human nature has its dark side, so does the law. The law's dark side stems from the dark side of human nature - the fact that some individuals by design or impulse take the life, property, or - to mention those in narcotics traffic - the liberty of others. Note that I have not spoken in terms of law-breakers generally. For there are some 10,000,000 court cases in this country each year. Some millions of these are criminal. But the overwhelming number concern offenses such as traffic violations, tax violations, and other conduct which can and does often involve the law-abiding citizen. The dark side of the law really focuses on crimes of violence to a person or the taking of property or the engaging in an underworld business prohibited by our society.

In older times our talk of the law's dark side was likely to be as sensitive as a sledgehammer. Listen to Maine State Prison Warden Rose, speaking over a century ago. Prisons, he said, "should be terrifying, dark and comfortless abodes of guilt and wretchedness. No mode or degree of punishment is so well adapted to preventing crime and reforming a criminal as close confinement in a solitary cell, cut off from all hope of relief, furnished with a hammock on which to sleep, a block of wood on which to sit. There his vices and crimes will be personified and appear to his frightened imagination as covenants to overwhelm him with horror and remorse."

Today we are still concerned, though more genteel. Our discussion is more likely to be that crime is getting out of hand, that courts are too soft on criminals and impose impossible burdens on the police, and that the time has come to give society increased protection against its enemies.

Let me read from two eloquent judicial dissents which probably reflect the opinions of many of you.

> ". . . . Questioning is an indispensable instrumentality of justice . . . . We cannot read an undiscriminating hostility to mere interrogation into the Constitution without unduly fettering the States in protecting society from the criminal . . . . [And, in another case:] To bring in a lawyer means a real peril to solution of the crime, because . . . any lawyer worth his salt will tell the suspect in

> no uncertain terms to make no statement to the police under any circumstances . . . . I doubt very much if they [speaking of the protections of the Bill of Rights] require us to hold that the State may not take into custody and question one suspected reasonably of an unwitnessed murder. If it [sic] does, the people of this country must discipline themselves to seeing their police stand by helplessly while those suspected of murder prowl about unmolested . . . ."

There are several points worth making about these dissents. The first is that they have nothing to do with today's controversy. They are from cases in 1944 and 1949, in both of which the Supreme Court held confessions inadmissible in evidence because the suspects had been held incommunicado for 36 hours to four days, without sleep or rest, and questioned by relays of officers. The second point is that people twenty years ago were just as disturbed over the prospect of murderers prowling the streets as they are today and, had a popular vote been taken, just as likely to uphold the dissent. And the third point is that the issue in those cases is dead. No court in the country would seriously consider admitting confessions obtained under those circumstances, and law enforcement officials everywhere have learned to do their work effectively without resorting to that variant of the third degree.

But, of course, the underlying problem is not dead. We are still involved in trying to balance social interests and individual rights - in trying to decide how far our conception of a free society requires hindering the police in what they consider to be efficient ways of preventing and punishing crime and before we decide that there is an easy answer, it is important that we understand in more detail the nature of the problem. The first thing we should understand is how dark the subject of crime and punishment really is. We know all too little about crime, its extent, cause, and effects, and about the effectiveness of our ways of dealing with it. Let me cite a few specifics.

We really don't know much about the "crime rate" in general - in the nation, in a state, or even in a particular city. Many crimes are not reported to the police, and those that are, are not reported in the same ways. There are some 40,000 separate police jurisdictions which can and do vary in their policies, aggressiveness, and accuracy in reporting. We therefore cannot compare with confidence the present incidence of "crime" with prior records until both public willingness to report and administrative reporting become more adequate.

If there is uncertainty about the extent of crime in general, there is uncertainty multiplied as to specific kinds of crime. As Professor James Vorenberg, the Executive Director of the President's Commission on Law Enforcement and Administration of Justice, has pointed out, it makes no more sense to regard crime as a single phenomenon than to try to interpret health trends without looking separately at figures on tuberculosis, lung cancer, and measles.

If our basic data about crime leave room for improvement, so does what we know about our handling of crimes. The top of the iceberg consists of cases which find their way to trial. Even here we do not know the real effect of court rulings throwing out cases based on involuntary confessions or evidence produced by illegal search. How many of such cases are retried, resulting in conviction? How many such cases could have been tried successfully without the confession or seized evidence? Following on the heels of the recent Supreme Court opinions, some officials were quick to predict a field day for defense lawyers and criminals. But there are other voices. There is the record of the FBI, which had initiated the warning procedures on confessions long before the Supreme Court spoke. And there is the testimony of Judge George Edwards, who left the Supreme Court of Michigan to take on the job of Police Commissioner of Detroit before being appointed a U.S. Circuit Judge. Michigan courts had anticipated the

Supreme Court in its recent rulings. Judge Edwards reports that the Detroit Police followed the new procedures - with a record of increased arrests resulting in prosecution. Confessions in murder cases actually increased. And in Essex County, New Jersey, after two years of advising suspects of their rights, no change in the confession rate was observed. And there is the recent experience of the Los Angeles County police, reported by District Attorney Evelle Younger. Of 2,780 felony cases studied this summer, he says, "only a small percentage" could not have been successfully prosecuted without a confession. And, of 790 suspects who were informed of their rights to remain silent and to obtain a lawyer, 433 - over half - still confessed.

But the fact remains that empirical data are all too meager even on the cases most capable of documentation. On the 90 per cent of the cases which never see trial, we know even less. These are the cases where the practices of police and magistrates are never tested by court rulings on evidence. There is little data or analysis about conduct and effectiveness in this major part of the administration of justice.

The lesson I would draw from all this is that we should step up our efforts to achieve better statistics and better analysis and not be afraid to experiment with new approaches at all points in the crime cycle - prevention, upgrading law enforcement as a profession, diagnosis, sentencing, custody, probation, half way houses, and post-release rehabilitation. This is another way of saying that the light of intelligence should be directed to this dark side of the law.

There is another light whose rays should illuminate our way. This is the light of memory. Individual rights are not a recent invention of some soft-headed, black-robed idealists. They are the creation of some 55 long-headed, pragmatic, property-owning, middle class citizens who approached the task of constitution making fully aware, as James Madison declared, that their work would "decide forever the fate of republican government". It was they who wrote into our Constitution and into the first ten amendments over five sixths of the sixty specific rights of individuals which we have today.

What did they have in mind? Of course they had in mind the long, slow sweep of English history, beginning with Magna Carta in 1215, establishing that there was a law above the king, continuing a hundred years later with the first statute to use the words "due process of law", and then the two century eclipse under the Tudors and Stuarts, when 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. Our founding fathers were determined to carry over all of the rights that had been won by Englishmen during these tragic years. But they had something more in mind.

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.

From these histories the draftsmen knew of Sir Thomas More who was charged in 1535 with refusing to legalize the second marriage of Henry VIII and to recognize him as supreme head of the Catholic Church in England. As to the first question, given the option of saving his body or his soul, he chose his soul, using the phrase, "according to the dictates of my conscience". Over 200 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 these abuses 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 time, John Lilburne. He was dragged to Star Chamber for having imported from Holland books 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." He was gagged at the pillory and whipped 200 times from Fleet Street to Westminister. But his case provided the impetus that led Cromwell's Parliament four years later to put an end to the dreaded Star Chamber.

Finally, in 1670, came the case of William Penn. Penn, being forbidden to preach within any building, preached to a quiet group of Quakers on Gracechurch Street in London. He and a listener named Mead were 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 fined them 40 marks apiece for keeping their hats on. The two culprits were then banished to the Black Hole and the jury charged to return a verdict of guilty of unlawful assembly if they found so much as that Penn had preached. The jury found that he had preached, but refused to find any unlawful assembly. The jurors were scolded by the judge and 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.

But by this time the 55 delegates were exhausted. There was more to do. All English rights had been carried forward, but not others 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. But time and energy had run out. A bill of additional rights would have to await the new Congress the next year.

Let me give you just one vignette of the debate on that bill of rights to show the unspoken language of history that our founding fathers held in common. James Madison, drawing on Virginia's Declaration of Rights, had presented a series of amendments. He ran into trouble from the very first one - that concerning freedom of speech, press, and religion, and assembly. Sedgwick of Massachusetts waded into it, 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 commitee 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 that parliamentary debate has to offer. John Page of Virginia 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 119 years before 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".

Apart from Sir Thomas More and William Penn, and possibly John Udall, I doubt that we would particularly like the rest of these 16th and 17th century characters. Prynne was a prude. Lilburne was a troublemaker. But they all contributed to the rights 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. What they so deliberately wrought, we should not lightly discard even though the pressures of a largely urban society of 200 millions of people may tempt us.

I have spoken of the light of intelligence and of the light of memory. I close with another perspective. This, too, is a light to be cast on the dark side of the law. But this light comes not

from the lamp of the study but from the fire of citizens' commitment. For the historic dual task of protecting both society and the individual cannot safely be charged to any one instrumentality of government. To be sure, it would be simple to give the police unrestricted powers of arrest, search, seizure, and interrogation. It would be simple were the courts not so insistent on respecting constitutional rights. It would be simple if parole boards seldom granted parole or if few offenders were granted probation.

But any such simple course spells retreat for society. It is always easier for society to retreat than to advance. But advances in the containment and reduction of crime require the commitment of citizens to improving their homes, schools, communities, to helping build bridges to isolated individuals before and after an act of crime, to providing the understanding and the funds for better services and institutions of law enforcement, custody, and rehabilitation. In short, for real advances to take effect, an entire society must be on the move. To illuminate the dark side of the law will require more than a single spot light. It requires the search light of intelligence, the background lighting of reflection on our origins, and the white heat of commitment by all of us.