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Commencement Address

Donald P. Lay

COMMENCEMENT ADDRESS

The following is the text of an address given by The Honorable Donald P. Lay, Circuit Judge of the 8th Circuit Court of Appeals, St. Louis, Missouri. The address was given during commencement exercises held on October 11, 1969, in which past graduates of the University of North Dakota School of Law were awarded the Juris Doctorate degree in Law.

It is a rare privilege to be able to share this Commencement occasion with you. Usually a Commencement exercise connotes not only a culmination of enterprise, associated with a graduation, but a new beginning as well. This may seem somewhat of a misnomer to many of you, since I am confident you expect to find the same cases, same problems and follow the same approach upon return to your practices Monday morning. However, I think there comes a time in everyone's professional life to review, rethink and reshape not only ideas and methods, but ideals as well.

I am confident that today's exercise has meaning and value to you. The very effort of your attendance signifies greater meaning than the mere acquirement of a new title and new certificate to place on the wall. A degree of Doctor of Jurisprudence signifies to the world that you are a person who possesses an esoteric approach to the law itself. To use simple terms, it is recognition of someone who *understands* the law itself.

Someone once said, to understand is to forgive. Perhaps this paraphrases better than anything else my discussion this morning.

Today's events make it so patently true, that it is fundamental to our survival that all people everywhere must understand and respect the law and its machinery. All forms of government break down if there exists no respect or appreciation for it. The Barons of Runnymede made this clear when they met with King John in 1215 A.D. If law is not respected, is considered harsh or arbitrary or perhaps to borrow some of the modern day cliches, is observed as "anti-God," a "coddler of criminals" or "racist," the law and its machinery as we know it cannot survive the rebellion of men who should abide by it. History is the authoress of the proof: the survival of any law must always depend upon the voluntary assent and respect of the people it governs.

I find it alarming that today the majority of well-intentioned people view the Bill of Rights as hallowed ground only when infrequently applied. Notwithstanding faith in a democratic majority, one can readily find in recent history instances where popular majorities have been defiant to the rights of minorities. James Madison and Thomas Jefferson insisted upon a written Bill of Rights which could permanently withstand despotic majority wills. The judicial branch of government became the only mechanism by which these rights could be protected and in this sense the courts became the guardians of the people's individual rights. History records that indeed the original Constitution would not have been ratified had it not been for the faith that it would be so amended to include a Bill of Rights. Thus our forefathers saw that constitutional liberty would always be in peril unless established by irrevocable rule. As Mr. Justice Davis wrote in *Ex parte Milligan*, "the Constitution of the United States is a law for rulers and people equally in war and in peace and covers with it the shield of its protection all classes of men at all times and under all circumstances."

In 1954 the beloved Mr. Justice Felix Frankfurter explained: "Broadly speaking the chief reliance of law in a democracy is the habit of popular respect for law. Especially true is it that law as promulgated by the Supreme Court ultimately depends upon confidence of the people in the Supreme Court as an institution. Indispensable, therefore, for the country's welfare is an appreciation of what the nature of the enterprise is in which that court is engaged—an understanding of what the task is that has been committed to the succession of nine men." Justice Frankfurter made this statement on April 22, 1954, before the American Philosophical Society. On May 17, 1954, the newly appointed Chief Justice Earl Warren handed down the Court's now famous school segregation cases, declaring the old doctrine of "separate but equal" inherently unequal. The Court ordered that Negro students be admitted to white schools in the states of Kansas, South Caroline, Virginia, Delaware and within the District of Columbia.

Shortly thereafter began the most volatile criticism of the Court since the days of President Roosevelt's court packing plan, and even comparable to the divisive attacks made in 1857 after Chief Justice Taney's *Dred Scott* decision. In 1954, 96 Southern Congressmen joined in a resolution by stating: "The decision of the Supreme Court in the school cases is clear abuse of judicial power. The original Constitution does not mention education neither does the Fourteenth Amendment or any other amendment." The aftermath of that Court's historic decision is present history. Southern Governors defiantly refused to accept the rule of law, and force on

extreme occasion supplanted it. At the same time the Supreme Court was sitting on yet another bombshell.

In District No. 9 in New Hyde Park, New York, each class read aloud every day in the presence of their teacher, an innocent, but simple prayer: "Almighty God, we acknowledge our dependence upon thee and we beg thy blessings upon us, our parents, our teachers and our country." Only Mr. Justice Stewart dissented as the Court held that the prayer was impermissible as violating the Establishment Clause of the Constitution. Shortly thereafter the Court declared school opening exercises, consisting of a voluntary recital of The Lord's Prayer and voluntary reading of passages from the Bible as being equally unconstitutional.

This was too much. Letters swamped Washington and Congress. Legislative hearings began to consider a constitutional amendment. However, in cool reflection, numerous religious leaders in 1964 opposed a House Judiciary Committee's study to tamper with the First Amendment. Nevertheless, last year a nation-wide poll indicated that the American public was still more disturbed over the school prayer decisions than any other decision.

As criticism began to mount, the Court began to bring within focus a long overdue recognition of procedural due process within state criminal proceedings. Perhaps with Runnymede in mind, Mr. Justice Frankfurter observed in 1943, in *McNabb* v. *United States*, 318 U.S. 332, 347: "The history of liberty has largely been the history of observance of procedural safeguards." Thus, in 1961, began a series of cases about which the average layman has been told turned murderers loose cell block at a time, prevented police from seizing evidence of the crime, strengthened Mafia control of the country, allowed a retrenchment of morality by the flood of obscene literature in the mails, protected juvenile delinquents and which has also given protection to all gamblers as well as all criminals who own sawed off shotguns. Within this background, one can read in the newspapers at home or overhear at the drug store or barber shop, or perhaps even at a Bar Association meeting, that the Supreme Court has now become not only "godless" but disloyal as well. Without any consideration of First Amendment principles or of the facts or law involved, newspaper headlines state that the High Court has struck down laws which proscribe Communists from working in our defense plants, from serving on our merchant vessels or teaching in our schools. And as if to put frosting on the cake for those who have in disgraceful tones endorsed the impeachment of former Chief Justice Earl Warren, we find renewed attacks by Congressmen that the Court has entered the political arena by disturbing the historic control of state legislators and congres-

sional districts under the reapportionment decisions of *Reynolds v. Sims, Baker v. Carr* and *Wesberry v. Sanders.*

I would submit the average American today is being taught more infectious contempt and disrespect for the law through the dissemination of constant misinformation and unqualified criticism than ever before in our nation. I suggest to you a simple but troubling truth: that a representative form of government cannot prevail in a society which thrives upon benighted ignorance. Emotional headlines and sermons daily reach the ears of the average American offered by persons who do not attempt to understand the law themselves. These headlines even affect lawyers who do not bother to understand or read the cases themselves.

How many of your children read Little Orphan Annie in the newspaper? A few months ago I read where Annie was talking to her dog Sandy about a poor fellow in a wheel chair, and says: "So he got crippled and lost everything; the cops caught the monster and he confessed and the court turned him loose. Oh, brother!"

I read a sermon the other day where a minister is talking on law and morality and suddenly turns upon the Supreme Court with a vicious attack by saying it represents "the malignant moral tolerance of the public." The minister concludes "what a sad commentary it is on the morals of a Nation when its Supreme Court is more interested in the constitutional rights of criminals than in the inalienable rights of the people to Life, Liberty and the Pursuit of Happiness." I wonder how many persons in that congregation came away with respect for law and its courts? This sermon demonstrated the total lack of understanding of what issues were involved. I am confident from his text that his opinion was formed from headlines of a newspaper and not from reading the opinions themselves. For the words of these great justices reflect a greater love and appreciation for law, liberty and morality than any such "harbinger of doom" could ever comprehend.

Do the headlines give the public *confidence* in the rule of law and the courts of this country? I wonder how many more in that particular congregation would have come away with assurance, if the law had been praised and explained, if the Supreme Court had been upheld as a great and respected tribunal. Would we gain understanding and respect for law and order if information media would better explain the basic principles and reasons behind the decisions so the public could understand what the case is really about and why the result had been reached? Let me give you an example.

What if your 15 year old son was arrested and you were not notified of his arrest until late at night. You find he is in jail because

a neighbor lady charged that he used abusive, adolescent, offensive language to her over the telephone. Assume the Juvenile Court holds an informal hearing while you are out of town and only your wife is present, the neighbor lady is not called to testify, and the boy denies he used the foul language on the telephone but says another youngster did. You are not notified of any formal charges and all of a sudden the juvenile judge sends you a letter saying your boy is delinquent and he is sentenced to the State Reformatory until he is 21. In other words, a sentence for six years is imposed, whereas if an adult had been found guilty of the same offense the maximum confinement would have been 60 days. There is no appeal to the State Supreme Court from such an order. Because he was a juvenile the boy was denied: (1) notice of charges, (2) right of counsel, (3) right to confront complaining witnesses and cross examination, (4) privilege against self-incrimination, (5) right to a transcript of the informal hearing, and (6) right to appellate review.

Do you feel this is the kind of justice you want in America? Yet this happened recently to Gerald Gault, a 15 year old in Arizona. On May 15, 1967, the Supreme Court reversed this commitment as violative of the due process clause. The Court simply followed a well-founded guide for juvenile courts called "Standards for Juvenile and Family Courts" and the Report of the President's Crime Commission, which recommends: "Counsel should be appointed as a matter of course whenever coercive action is a possibility, without requiring any affirmative choice by child or parent." Yet the Supreme Court was severely criticized by certain members of the press as once again coddling criminals and thwarting criminal justice. Where do you stand? I know where you would stand if this ever happened to your son.

Judge Pound of the New York Court of Appeals made the statement sometime ago that best summarizes the concern with due process in criminal procedure when he said: "Although the defendant may be the worst of men the rights of the best of men are secure only as the rights of the most violent and most abhorrent are protected." I wonder if it would not cast some light if lawyers and judges, who profess to understand the law, could respond to informal criticism of the Supreme Court by paraphrasing Judge Pound saying, that we should all remember "that the rights of the best of men are secure only as long as the rights of the worst of men are protected."

Dean Pollock of Yale University Law School observes: "The community that fails to insist on scrupulous observance of high standards by its police, by its prosecutors and by its judges and juries has surrendered responsibility for its most awesome institu-

tions; such a community has lost track of the purposes which brought it into existence."

How easily these principles are forgotten or set aside in the emotional hysteria when the reckless headline is read. How hastily the average person forgets our basic heritage of the English experience and the proposition that every man is first presumed to be innocent, however guilty he may prove to be upon due inquiry. And that with this presumption of innocence, it becomes the duty of every court to see that persons accused are denied no essential element of fair trial or fair investigation.

Mapp v. Ohio, in 1961, barred state convictions premised upon evidence illegally obtained. Then came *Gideon's* trumpet which guaranteed the right of counsel to all persons charged with a felony, followed by *Malloy* with the application of the Fifth Amendment's principle of self-incrimination to the state defendant. These decisions immediately brought public denunciation of their own basic Bill of Rights. The *Gideon* case at the time was considered to be the most controversial. Thereafter many state prisoners complained they were deprived of their constitutional rights by failure of the state to provide them with right of counsel. The *Gideon* rule was held to be retroactive and in many states, problems of procedure and retrial were reluctantly faced by state officials.

Then in 1964, along came the *Escobedo* and finally the *Miranda* cases, which have all been so highly publicized. These cases further extended federal standards to state officers. In *Miranda* it was specifically spelled out that incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self incriminatory statements without forewarnings of constitutional rights, would not be acceptable.

Despite the clamor of a few disenchanted prosecutors and attorney generals, *Miranda* and its progenitors are having a tremendous impact upon the effectiveness and dignity of law enforcement in the United States. A recent study done by the Yale Law School, as released in their July 1967 Law Journal, exhausts the overall area. It was carried on with the cooperation of all the police officials of New Haven, Connecticut, a city of 150,000. The study reaches certain conclusions that are rather interesting to consider: (1) That questioning was necessary to solve a crime in less than 10% of the felony cases in which an arrest was made. (2) That warnings have little impact upon a suspect's behavior; that if the suspect wants to talk he will do so notwithstanding the warning. (3) That if a lawyer is contacted before interrogation he can become a substantial aid to the suspect. The report states that the lawyer's presence does not affect the outcome in most cases, in

terms of a judgment of guilty or not guilty, but he can substantially enhance the suspect's chances of an opportunity to plead to a reduced charge or of receiving a favorable sentence after a guilty plea; and he can safeguard the rights of the innocent. (4) That the impact of *Miranda* and its predecessors has had an important and salutary effect upon the police. (a) They realize that their actions are subject to review and that they do not create the rules of interrogation. (b) That thorough investigations are being carried on to obtain corroborative evidence for trial. Apropos here, I believe, is Mr. Justice Goldberg's statement: No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, that he will become aware of and exercise his constitutional rights.

I once suggested in a talk that much of today's criticism of the courts and law was based upon emotional and uninformed analysis. An editorial writer of a newspaper responded that I endorsed censorship of court criticism. It is this type of half-truth by the mass media which I condemn. Informed, constructive critics serve a salutary purpose. Those who pretend analysis but fail to read the decisions and care less as to the principles behind the law help destroy her. I recently read a newspaper's attack upon the *Gideon* case, that the case itself, had been responsible for a crime wave by freeing convicted felons. The editorial reasoned that the recidivist rate in this country proves that many of the men freed under the *Gideon* rule returned to crime. Of course, the basic rationale of *Gideon* was never explained in the article. The basic rationale that before the state may deprive a member of society of his freedom or liberty, he is entitled to be represented by competent counsel was not mentioned. The fact that the equal protection clause of the Constitution should not turn upon the wealth or indigency of an accused was not publicized. Furthermore, if the critic wanted to make an informed analysis he would find that the Florida Correction System made a study of those released under *Gideon* which disproved any causal connection between *Gideon* and a resulting crime wave.

The *Gideon* case arose in Florida. Under Florida procedure an accused who could not afford a lawyer had to defend himself. The Supreme Court decision in 1963 declared that failure to provide counsel to indigents who had not waived their right to counsel was contrary to the due process of law required by the Fourteenth Amendment. This resulted in the retrial of some 2,200 prisoners then incarcerated in the Florida prisons. Some 1,200 of this group were either acquitted or released outright. Many feared that a crime wave would follow.

The national rate of recidivism is determined by the number of former convicted felons who are *rearrested* after their release from prison. The national statistics on recidivists is always high since police generally arrest ex-felons upon investigation when a new crime is committed. Sixty-eight per cent of ex-felons are said to be rearrested within a period of four years of their release from prison. However, only about one-third of these men are ever actually convicted of commission of another crime. Of those released under the *Gideon* case in Florida only thirteen per cent were ever rearrested and only a small percentage of these prisoners were ever convicted of another crime.

In 1966 the Research Consultant for the Florida Division of Corrections reported with proven statistics. He stated: "Those who confidently predicted in 1963 that the Gideonites released prematurely would participate in a wave of criminal depredations upon Florida society were found to be mistaken."

The idea that a man should not be released for illegal imprisonment is repugnant to Anglo-Saxon concepts of justice. And certainly only a sick society would operate on the theory that once a man is convicted of a crime the prison key should be thrown away for fear that he will commit another crime.

Everywhere one turns, there exists public dismay over Supreme Court decisions of the so-called "Warren Court." There is, we read, the need for the Court to change its image so law can once again be "respected." These attitudes are bewildering to me. Much of the criticism goes hand in hand with the rising crime statistics. It is difficult for a layman, and the lawyer who has dealt in commercial law to fully understand that our system of criminal law is based upon the accusatorial trial and not trial by inquisition.

Has the law really failed in the past twenty years? I respectfully submit to you that it has not; that in fact, it has moved in an opposite, meaningful direction. The Warren Court, in my judgment, has provided a foundation of heritage for free men, black or white, rich or poor, that will last down through the centuries. No Court, no Congress, will undo this monumental work.

What will the critics undo? Do they "when the chips" are down want to amend the First Amendment to permit state condoned religions? Do they want a paternal order which will dictate what books or magazines you can read, a society of self-censorship afraid of free expression or literary composition? Shall we hold that only the rich man is entitled to counsel when his life or liberty is threatened at trial or upon appeal? Shall we reverse those holdings which say that police should not use suggestive means to unsure witnesses in making identification in lineups? Shall we allow long

detentions and closed door interrogations of individuals by police without the right of representation by counsel? Shall we do away with the right of confontation and cross-examination and go back to the pre-*Bruton* days, allowing convictions of co-defendants by hearsay evidence? Should we revert to the mockery of the doctrine of separate but equal in the field of education or civil rights?

A government is only as strong as the moral fiber of its people. Any government is only worth having as long as it can openly tolerate dissent and free channels of expression. Once we fear the extremes of associations or speech then we acknowledge the weakness of our own bond. Once we suppress minority rights in favor of the emotion of the crowd, we unwittingly sacrifice the majority's interest. If, in the name of justice, we are willing to let the end justify the means, let convictions be the goal at any cost, deprive the indigent and the unknowing of the right of counsel, overlook illegal intrusion of government into our homes and privacy, have loose standards of proper arrest and arraignment, allow police inquisition and trickery (an Attorney General of a Midwestern state told a Senate Subcommittee that he believed in using trickery to get confessions), I ask when this occurs do we really protect the interest of society as a whole. History's lesson teaches that the rights of the many are only secure as long as the very least individual right is sacrosanct from abuse.

The American lawyer holds in trust the great heritage of the law itself. When he publicly condemns it or its institutions he desecrates that heritage. This is not to say that the lawyer does not have a right to disagree with the law, but in debating it we should not allow the public to miscomprehend our adversary tradition as a charge of disrespect. We owe an obligation as keepers of the light to better inform, to enlighten if you will, the public as to the law, the reasons of the law, the basic liberties and democratic tenets at stake in the opinions of all courts. Today the American lawyer is failing that trust. This is a serious condemnation and yet it is true. We stand by and allow news media and mass communication to inculcate the public's minds through headlines with contumacious disrespect for the courts and the law itself. Are we not all students of the legal and juridical personality? Do we not have special training to understand the law and its intricate machinery? Do we not daily profess greater knowledge in it than laymen? Yet laymen, ordinary men if you will, cannot give obedience to the law if they do not feel it is revered and loved by those who claim to know its esoteric values. The old maxim is so true: that those who doubt do so because they do not know safely what to believe.

So if there be a Commencement theme today mine would be—

to begin—if you have not already—to inform yourself as the expert in jurisprudence and to take every opportunity to publicly inform others as to the full meaning of the law.

We should thank God everyday that we live in a country that values the rights and freedoms of individuals and that there exists a system of law which so recognizes it.

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