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Challenge to the Bar

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A CHALLENGE TO THE BAR*

About ten years ago the so-called new Supreme Court was busy re-examining such gloss as *Hammer v. Dagenhart* [1] and *Tyson & Brother v. Banton*[2] had placed on the Constitution. At the end of a Term during which a number of cases of that vintage had been overruled I visited a small town in Oregon on a fishing trip. I stopped by the courthouse to pay my respects to the state court judge. He called in the members of the Bar — six in number — and we had a delightful tea in his chambers. We explored many topics in our conversation from dry fly fishing to stare decisis. Finally, near the end, there was a long pause when a lean country lawyer spoke up.

"May I put a professional question?" he asked.

"Certainly," I replied.

"Then tell me this," he said. "Are you fellows fixin' to overrule the *Rule in Shelley's* case?"

I do not come here to urge the Institute to launch a program as revolutionary as that one would be. But I do come to commend to the Bar an educational program — a crusade, if you please — on procedure. By procedure I do not mean the narrow technical conception which we associate with pleadings. Rather, I mean the essence of due process, the curbs and restraints which Anglo-American experience has produced to prevent a man's life, liberty, or property from being subject to the caprice of a branch of government or of one of its officials.

History shows that governments bent on a crusade, or officials filled with ambitions have usually been inclined to take short-cuts. The cause being a noble one (for it always is), the people being filled with alarm (for they usually are),

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1 247 U.S. 251 (1918).

2 273 U.S. 418 (1927).

the government being motivated by worthy aims (as it always professes), the demand for quick and easy justice mounts. These short-cuts are not as flagrant perhaps as a lynching. But the ends they produce are cumulative; and if they continue unabated, they can silently rewrite even the fundamental law of the nation.

I was reading the other day the trial of Sir Walter Raleigh which was held on November 17, 1603.[3] It was one of the treason trials at the commencement of the reign of James I. James seemed determined to suppress the Catholics. And so plots were apparently hatched against him. One was to kidnap the King and by fear obtain from him a full toleration of the Catholic religion. Another was to enlist Spanish support and place Lady Arabella Stuart on the throne. It was in the latter conspiracy that Raleigh was charged with being involved. Raleigh was suspected of having ample grounds for joining the plot: Elizabeth had granted him a monopoly of licensing taverns and retailing wines which James refused to renew; and the post of Captain of the Guards had been taken from Raleigh and bestowed upon another.

The indictment charged that Lord Cobham and Raleigh were the conspirators. Lord Cobham was not produced at the trial. His examination before the Privy Council, however, was introduced in evidence. So were his letters. Raleigh, knowing that Cobham had retracted the confessions that implicated him, wanted Cobham produced as a witness. And so Raleigh said: "The Proof of the common law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face, and I have done."

Raleigh was overruled. Lord Chief Justice Popham said, "This thing cannot be granted, for then a number of Treasons should flourish."

Justice Warburton added, "I marvel, Sir Walter, that you being of such experience and wit, should stand on this point;

[3] *Rex v. Raleigh*, 2 STATE TRIALS 1 (Howell ed. 1809-1826).

for so many horse-stealers may escape, if they may not be condemned without witnesses."

Raleigh once more asked that Cobham be produced to testify: "Let my accuser come face to face and depose. Were the case but for a small copyhold, you would have witnesses or get proof to lead the jury to a verdict; and I am here for my life."

Lord Chief Justice Popham ruled once more: "There must not such a gap be open for the destruction of the King, as would be if we should grant this."

Cobham was never produced at the trial. And Justice Warburton was frank enough to give the reason — that if Cobham were called, he might retract what he had confessed before the Privy Council.

A virus had infected the trial and put it beyond salvation. The one witness called, a man by the name of Dyer, testified to the rankest form of hearsay. Dyer swore he had been to the house of an unnamed merchant in Lisbon and that he had met there an unnamed English gentleman who said James would never be crowned because "Don Raleigh and Don Cobham will cut his throat ere that day come."

The judges also strangely allowed as evidence against Raleigh a deposition of one Watson who said he had heard Cobham say to a third person, "There is no way of redress save only one, and that is to take away the King and his cubs, not leaving one alive."

The prosecutor for the Crown, Lord Edward Coke, was by modern standards guilty of gross misconduct. His exchanges with the accused would never be tolerated in any court in this nation; they rank indeed with the most bizarre activities of any investigating officer we have ever known.

> "Coke: Thou art the most vile and execrable Traitor that ever lived.

"Raleigh: You speak indiscreetly, barbarously, and uncivilly.

"Coke: I want words sufficient to express thy viperous Treasons.

"Raleigh: I think you want words, indeed, for you have spoken one thing half a dozen times.

"Coke: Thou art an odious fellow, thy name is hateful to all the realm of England for thy pride.

"Raleigh: It will go near to prove a measuring cast between you and me, Mr. Attorney.

"Coke: Well, I will now make it appear to the world, that there never lived a viler viper upon the face of the earth than thou."

It was said that Coke made up "by the violence of his demeanor for the poverty of his case." Certainly Raleigh was convicted of a capital offence in a trial which was a sham and mockery. One of the judges was Robert Cecil, a rival of Raleigh's who sought his political destruction. Raleigh stood alone without any counsel to aid him, facing the best legal array the Crown could produce. Ideas of decency and fairness were discarded, the judges and the prosecutor became instruments of revenge, not justice, and Raleigh was sent to his death on a record which by modern standards contained no more than a shred of competent evidence.

As students of those times have pointed out, the real trials took place in the Privy Council where the proceedings were secret and where torture was used. In the jury trial that followed, there was no power of an accused to call a witness, no right to counsel. There was moreover no weighing of the credibility of a witness, no effective cross-examination, no confrontation of witnesses. Cross-examination was indeed the instrument of the Crown, used by the prosecutor and the judge to riddle the accused and secure his conviction. "The opinion of the times," Stephens said, "seems to have been

that if a man came and swore to anything whatever, he ought to be believed, unless he was directly contradicted."

This was some of the stuff behind the clamor for a Bill of Rights at the time of the adoption of our Constitution. It was the farcical trials of Raleigh and others that brought into the debates on the Constitution, as reported by Elliot,[4] the demands for the guarantees of procedural due process now contained in the Fifth and the Sixth Amendments.

There was experience closer to home that also made the Fathers insistent that procedural safeguards be placed in the Constitution. The Special Court of Oyer and Terminer sat in the Colony of Massachusetts from June to September, 1692, trying men and women for witchcraft. The judges were laymen. (One Nathaniel Saltonstal to his credit refused to serve.) The Attorney General was a merchant. No person trained to the law had anything to do with the court or the trials. In 1692 twenty persons were tried for witchcraft and each of them found guilty. Most of them were hung; one — an old man of 80 — was pressed to death.

The court was sustained by the prevailing opinion of the age. It was a popular tribunal, the trials being only a form of executing the vengeance of the community. The outbreakings of the multitude that crowded the trials took the place of rules of procedure. Those trials read pretty much like the accounts of trials taking place today before the Supreme People's Courts in Red China.

At the witch trials the prosecution called a person who gave "spectral evidence" — that the accused had appeared to him and caused injury. The prosecutor had a list of confessed or reformed witches who then took the stand and testified against the accused. Then all from the crowd who wanted to testify against the accused were heard.

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[4] ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION (2d ed. 1836).

The records of that court illustrate what happens when popular opinion rather than law provides the standards under which men are tried. That was a court freed of the technicalities of the law. Judges and jurors were allowed to follow their own instincts and desires. There was no restraining influence. The judges and officers who participated were honest and sincere. But they were wholly unfit to hold the scales of justice. They had no familiarity with rules of law or procedural due process. It is inconceivable that in 1692 such proceedings could have been conducted in Massachusetts had there been in existence a Bar educated in the rudiments of law. The conscience of the community soon caught up with this judicial extravagance. In 1693 the Superior Court of Judicature, which superseded the Special Court of Oyer and Terminer, had a record mostly of acquittals. And all of the persons convicted before it were pardoned. But the records of the witch trials left ugly scars not soon forgotten.

We have today no exact parallel of the treason trial of Raleigh, no exact counterpart of the witch trials of the Massachusetts Colony. But we have trials and investigations which perpetuate some of the evils of Raleigh's trial and of the witch trials. We have practices and procedures that impinge heavily on the liberties of the citizens. We deprive men of jobs and destroy their reputations with practices as callous as those involved in the trial of Sir Walter Raleigh; and we traffic in hysteria almost as acute as the atmosphere surrounding the witch trials. Who is there who does not cherish his reputation, his professional stature, his honor as much as life itself? What greater inroad on liberty can there be than an official condemnation of a man without due process? There are three aspects of this problem:

First. During the 14 years I have sat on the Supreme Court I have seen many records of criminal trials. During that time it has seemed to me that the quality of prosecutors has markedly declined. I speak only in terms of the *average,*

realizing full well that many prosecutors have adhered faithfully to our finest traditions. But in some cases it seemed that the prosecutors were resorting to modern witchcraft, confusing the "internal and external aspects of the Communist threat" — to use the recent words of Ambassador George F. Kennan — in an effort to get the spectre into the jury room. Sometimes they almost seemed to emulate the example of Coke in Raleigh's trial. Sometimes they treated the courtroom not as a place of dignity, detached from the community, but as a place to unleash the fury of public passion. And in that project the press has played a part. It has pumped into the jury room hearsay, confessions, theories, and influence which if done in the courtroom would result in mistrials. Yet District Judges I know feel that the effect on the end product of the proceedings was probably as fatal as if they themselves had sanctioned the barrage of propaganda and allowed it to infect the trials.

Second. We have built in this country a vast network of wiretappers and eavesdroppers. In New York City alone there were in 1952 at least 58,000 permits issued to tap wires, a practice which in sturdier days a great Olympian, Mr. Justice Holmes, condemned as "dirty business." By 1949 the New York Times reported that so many wires were being tapped that officials hardly dared speak a confidence over the telephone.

Third. We allow important charges to be proved against a person in administrative proceedings on the testimony of witnesses whose identity and, therefore, whose prejudices are never known to the Government or to the accused. Some of these cases involve proceedings against persons deemed "subversive" or poor security risks and therefore not eligible for employment with the Government. Others implicate outsiders who must face the rigors of administrative hearings in order to have their rights or status determined. These too are denied knowledge of the identity of the persons who accuse them.

As a result the cloak of anonymity is thrown over a growing underground of informers. As that secrecy mounts, the reliability of the information obtained must necessarily decline. One who is not put to the test of an oath, one who need not face his victim with the charge, one who need not suffer the torment of cross-examination can become quick and reckless with his whispered accusations. The consequences are not only disastrous to the individual; they reflect upon the tribunals which administer the system, just as Raleigh's trial reflected on the prosecutor and the judges.

Necessity is advanced as the reason for this practice — that there would be no informers if their identity were disclosed, that if facts are to be discovered, the sources of the information must be protected. That is always the justification of the police. It was the time-honored excuse of monarchs. That was the philosophy of Justice Warburton in Raleigh's trial: "for so many horse-stealers may escape, if they may not be condemned without witnesses." That, I submit, is a philosophy repellent to our traditions. I know that the current of decisions in the state and federal courts is opposed to the position I take. But I speak, I think, the conscience of the law when I say the practice should be condemned.

Today fear eats away at the hearts of men, until even old neighbors suspect one another. Alarms are sounded, anxieties are traded upon until a community does not know what to believe or whom to trust. There is, of course a real basis for a feeling of insecurity in the world today. A sense of uneasiness pervades every European country, every Asian village I have visited. And that insecurity is present in this country too. The threat to the independence of nations as the result of Soviet imperialism is real and imminent. But responsible people in dealing with our domestic problems do not trade on that fear. They realize that the greatest peril to a people would come should the administrative agencies,

the bureaucrats, the courts, the judges, and the procedure under which government operates ever become mere creatures of the popular will. Then hysteria and passion take over.

Those trained in the law know that we need not give up due process of law in order to save ourselves from internal dangers, any more than we need submit prisoners to the rack or to other forms of torture in order to solve crimes. We have the means and the ability to protect ourselves by fair standards of procedure. There is despair only when we turn to totalitarian techniques to defeat totalitarian forces.

Institutions do not rise, full grown. They are built gradually through the practices and attitudes of men. The evolution of the House of Commons in England is the product of a long succession of claims against the King, some acquired tentatively, then rejected, only to be reacquired. Eventually, the way of doing things by and before the House of Commons acquired the force of law. A long series of incidents and expedients in a frequently recurring pattern over a period of eight centuries resulted in a permanent institution.

Administrative law and practice, the manner of criminal and civil trials, the jury system, the conduct of prosecutors, the relation of the press to trials, the decorum of the judges, and the atmosphere of the courtrooms — these too are products of experience. Our finest legal traditions are indeed the product of the rejection of practices giving rise to abuse and the repetition of procedures found to be congenial with justice. Those of us who are custodians of the law, sworn to uphold constitutional traditions in our daily work, have a special responsibility. We have the duty to see to it that the recurring episodes and expedients by which dominant influences exploit mistrust and intolerance do not become the accepted pattern.

The press will commonly reflect (or even try to create) the view that the end justifies the means. Those of us dedicated

to the law must stand before those gales. Calm, dispassionate, and disinterested judgment is of course the first requirement. But this can be had only in an atmosphere of decorum and under rules of procedure that keep every trace of the mob from the courtroom and reflect an innate respect for the rights of man. As Mr. Justice Brandeis once wrote "insistence upon procedural regularity" has been a powerful influence in the development of our liberty.

The eclipse of Spanish learning and literature after the Sixteenth Century was doubtless due to the Inquisition and the vast schemes of censorship that followed in its wake. America does not stand in risk of any such eclipse. But we do need desperately to become associated, the world around, with ideas of freedom if we are to win the battle for men's hearts.

America, seen from abroad, seems alarmed, confused, and intolerant. The reasons are manifold. One important cause is a growing tendency in the interests of security to take short cuts, to disregard the rights of the individual, to sponsor the cause of intolerance, and to adopt more and more the tactics of the world forces we oppose. These practices and attitudes may go unnoticed here; but they make headlines in Asia. They are a powerful Voice of America, more powerful indeed than any program we can produce for radio broadcast. They have helped lose for America the commanding position of moral leadership which we had at the end of World War II.

Last year I visited Burma, torn by civil war for the last five years. For three years beginning in 1948 (when Burma received her independence) the Communists actually held nearly half of the provinces and administered the provincial governments. That condition has greatly changed; and the central government is now in control of most of the nation. I visited courts and talked with lawyers and judges both north and south. The writ of *habeas corpus* was flourishing

and respected. Trials were conducted with dignity and decorum. A much higher standard governs the admission of confessions in criminal trials in Burma than in any court in the United States.

I saw Malaya under siege. Up in central Malaya at Ipoh, the capital of Perak, I saw criminal trials. The accused were desperate guerillas dedicated to the Communist cause. Yet the court assigned each one a lawyer for his defense. The Bar of Ipoh — some 30 in number — was doing valiant work. Lawyers were assigned in rotation; and their defenses did credit to the highest traditions of the Bar. The courtrooms at Ipoh were quiet, majestic places, ruled over by stern but fair-minded judges. This was in the heart of jungle land where armed Communists worked night and day in guerilla warfare to destroy the government. But there was no hysteria, no atmosphere of passion, no photographers, no pressure of the press demanding convictions. And the prosecutor was a quiet, fearless man of dignity.

Those experiences brought, of course, a swelling pride in my heart at the glories of due process transplanted by the British in Asia. But what I saw has greater significance. Burma is winning her battle for Burmese hearts and minds and Malaya is turning the tide against Communism by the use of more than military tactics. Due process, as well as bullets, helps win those wars against Communism.

A procedure that respects the dignity and worth of the individual and that gives him full justice in his relations with his government commands men's loyalties even against the Communist forces that masquerade behind slogans of brotherhood and equality. Respect for that procedure in this country will help keep us true to the ideals of freedom and tolerance which up to the end of World War II made America foremost in the hearts of people the world over.

That is the crusade I commend to the Bar. The stakes are important, for the freedoms that are involved in the present world conflict are in final analysis mostly summed up in the concept of due process as we have come to know it.

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