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Rights That Are Wrong

Hon. Daniel A. Manion

LECTURE

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*The Honorable Daniel A. Manion**

When I served in the Indiana State Senate a number of years ago, legislators had a gimmick in which we would send constituents a form entitled "There Ought to Be a Law." A disgruntled voter who wanted a law changed could send his idea to his legislator. One reason I ran for office—literally, from door to door—was to change the law after the South Bend City Council approved an illegal annexation law which I had no standing to challenge in court. Once I was elected, we changed the law.

Since becoming a federal judge ten years ago, I have encountered hundreds of laws, and hundreds of lawyers challenging laws. Some litigants challenge their constitutionality. Others challenge the way the law is enforced or interpreted. Still others claim that the regulations developed as a result of a legislative directive are outside the scope of congressional intent. There is no limit to the imagination of those who create the laws and those who challenge them. But when a defect in the law is discovered, either by the people who apply the laws or by those to whom they are applied, a legislative repeal or the enactment of an amendment is a relatively simple process. Unfortunately, however, in recent years, instead of saying "there ought to be a *law*," litigants insist "there ought to be a *right*." A constitutional right. Litigants continually seek protection under the Constitution for activities that are often distasteful or just plain wrong.

Most constitutional litigation focuses on the First, Fourth, Fifth, Sixth, Eighth, and of course the Fourteenth Amendments. Before the Bill of Rights, our Declaration of Independence declared that our Creator endowed us with certain unalienable rights—God-given or natural rights—which include life, liberty, and the pursuit of happiness. The Bill of Rights did not actually bestow rights. Rather, it was designed to prevent a powerful government from interfering with individual rights that were already presumed, rights such as freedom of religion, speech, press, assembly, and freedom from unreasonable searches and seizures of person or property. Over the last two hundred plus years, and more particularly the past thirty or forty years, the vessel of constitutional rights has drifted far from the moorings on which the Framers understood these preexisting rights to rest. Many people do not understand why the courts have taken this course.

My goal here is not to complain about how these rights evolved or how judges create or disregard constitutional rights. Rather, I want to direct attention to constitutional rights that protect activities which are obviously

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wrong. More particularly, I want to address the dual duties of lawyers not only to protect and enforce rights, even as they have come to exist, but also to criticize wrongful activity that is protected as a Constitutional right.

A lawyer who is just beginning to practice will be under great pressure to keep quiet about controversial issues. When representing a client as an advocate, lawyers are expected to vigorously and zealously prosecute or defend. A client's position may be contrary to your own ideals. So if you are appointed to defend someone accused of a crime, you can vigorously force the state to prove guilt beyond a reasonable doubt without at the same time endorsing the criminal act. Or if you represent a plaintiff in a medical malpractice action, you can vigorously challenge the hospital and the practitioner without personally condemning the institution or the individual. In a divorce you represent a client under the law; you do not condone the act.

But when you step outside the courtroom, and speak on your own behalf and not on behalf of a client, the focus will be on you. At this point think about your own reasons for going to law school and looking forward to a future in the law. Of course, you want to help people. No doubt you want to improve society. Perhaps you look at law as a prestigious profession, one that will bring success in other fields such as politics. Perhaps you merely want to get rich. While some of these goals are high-sounding and some are mercenary, we know that the general public does not hold lawyers (and, I should add, judges) in high esteem. Many people blame lawyers and judges for a multitude of society's ills. Not coincidentally, lawyers' advocacy and judges' decisions inflict conditions on society that many have questioned.

Why does the general public complain? Because lawyers and judges seem to be proclaiming *rights* that protect activities that are clearly *wrong*. A quick trip through portions of the Bill of Rights (as well as a glance at recent news) underscores examples of the paradox where, by enforcing rights, we eliminate something good or protect something that is bad.

Begin with the First Amendment. (Many think the Constitution begins and ends there anyway, so it is an appropriate starting point.) It succinctly sets out religious, speech, press, assembly, and petition rights. When our Constitution was approximately 175 years old, our Supreme Court discovered that the Fourteenth Amendment incorporated the Bill of Rights and applied it to the states, and that prayer in public schools in fact "established" religion.[1] Since then, any religious display or prayer that a governmental entity even indirectly sponsors is challenged (and frequently struck down) as an establishment of religion. For example, our court recently struck down the Good Friday holiday for public schools in Illinois (it had been in place for over fifty years),[2] and earlier we told the Gideons that they could no longer exercise their annual tradition of handing out Bibles in a public school in Indiana.[3] We outlawed the corporate seal of the City

1 Engel v. Vitale, 370 U.S. 421 (1962).

2 Metzl v. Leininger, 57 F.3d 618 (7th Cir. 1995).

3 Berger v. Rensselaer Cent. Sch. Corp., 982 F.2d 1160 (7th Cir. 1993).

of Zion because it included something that looked like a cross.[4] Ironically, our court opens each day with "God save the United States and this Honorable Court;" our currency states "In God We Trust;"[5] and our pledge of allegiance says "one nation under God."[6] But the courts have deemed these references acceptable because they are rendered meaningless through "rote repetition."[7] During my own confirmation hearings, one senator criticized me for co-sponsoring a bill when I was in the State Senate to allow public schools to post the Ten Commandments in classrooms. A few weeks before the State Senate vote, the Supreme Court, by a 5-4 decision, had struck down a stricter Kentucky law that would have *required* such posting.[8] So now the public schools are devoid of any teaching that even borders on religiously-oriented morality; some seem to advocate just the opposite. At the same time teenage pregnancy skyrockets, drug use is pervasive, and violence is increasing. Some blame the courts.

If we shift to speech, we do not have to go far to discover why the American people are confused. A few years ago my court declared that nude dancers who performed at the Kitty Kat Lounge in South Bend, Indiana engaged in "protected speech."[9] At least the Supreme Court turned that one around,[10] but it upheld the right to burn the American flag as symbolic speech.[11] The First Amendment should and does protect controversial expression, especially political expression. But it also protects displaying and selling many forms of (borderline) pornography, and it certainly protects a person's right to read and discuss it.

These are just a few isolated examples under the First Amendment. Law students have studied many more. What the American people cannot understand is why, for example, the Constitution allows condom distribution in public schools but prohibits distribution of Bibles. They are frustrated by the serious breakdown in the family and the inability to discuss basic moral principles in public institutions.

The Fourth Amendment secures us from unreasonable searches and seizures. In our homes and other private places we are safe to do whatever we please as long as the police do not have probable cause to intervene. Of course, that applies to the bad guys too. Most Fourth Amendment challenges come to our court from criminals whose convictions include evidence seized during a search they claim was unconstitutional. You are well aware of the exclusionary rule.[12] Even though evidence discovered may include large quantities of dangerous drugs or illegal weapons, occupants of a private location have an absolute right not to be searched or to have

4 Harris v. City of Zion, 927 F.2d 1401 (7th Cir. 1991), *cert. denied sub nom.* City of Rolling Meadows v. Kuhn, 505 U.S. 1218 (1992).

5 31 U.S.C. § 5112(d)(1) (1994).

6 36 U.S.C. § 172 (1994).

7 *See* Lynch v. Donnelly, 465 U.S. 668, 716-17 (1984) (Brennan, J., dissenting).

8 Stone v. Graham, 449 U.S. 39 (1980).

9 Miller v. City of South Bend, 904 F.2d 1081 (7th Cir. 1990), *rev'd sub nom.* Barnes v. Glen Theatre, Inc. 501 U.S. 560 (1991).

10 Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991).

11 Texas v. Johnson, 491 U.S. 397 (1989).

12 Weeks v. United States, 232 U.S. 383 (1914) (applied in federal court); Mapp v. Ohio, 367 U.S. 643 (1961) (applied in state court).

their property seized unless there is probable cause—a reasonable basis.[13] Thus, people have a right not to be unreasonably searched, but they do not have a right to produce and market illegal drugs, to hide illegal weapons, to harbor fugitives, or to commit whatever other crime they can pull off while protected by the right to privacy of their home.

To the lay person, the Eighth Amendment is usually associated with capital punishment. But the Supreme Court has clarified that capital punishment is not cruel and unusual.[14] Now most Eighth Amendment cases are brought by prisoners who complain about prison treatment and conditions. In fact, prisoners are the main source of many constitutional challenges in our court.

The courts use the Fourteenth Amendment to apply the Bill of Rights to the states. The Fourteenth Amendment, like the Fifth, prohibits the state from depriving "any person of life, liberty, or property, without due process of law." It also prohibits denying any person equal protection of the laws. These two clauses are the subject of much constitutional litigation. The courts have gone beyond the language of this text by interpreting these provisions to be a fount of "personal dignity and autonomy,"[15] and have found there a "right of privacy."[16] Looking to the penumbras and emanations of the Bill of Rights, the Supreme Court has found these words to mean that the state may not forbid the use of contraceptives,[17] or forbid abortion,[18] or forbid the right to indulge oneself with obscene materials in private.[19]

Earlier I mentioned recent news. Four news reports involve significant examples of court battles over legal rights. First, states are suing tobacco companies. Documents recently released indicate CEOs may have lied under oath about nicotine being addictive and supplemented in cigarettes. Second, abortion clinic shooter John Salvi was convicted of murder. His lawyer says he was possibly insane and unfit for trial. Third, a baby was born to a comatose woman who was raped. The parents refused to allow an abortion; the doctor says the baby is doing fine. Fourth, homosexual marriages may soon be approved in Hawaii. The Full Faith and Credit clause of the Constitution[20] could force the forty-nine other states to recognize these "marriages" under their own state laws.

In these four stories, many other rights are implicated: limits on commercial speech of tobacco company advertising, the right of CEOs not to be witnesses against themselves, the right to a fair trial and the right to testify. Who has the right to decide whether or not an abortion is proper for someone not competent? This reflects on the right to assisted suicide

13 U.S. CONST. amend. IV; *see also* Wong Sun v. United States, 371 U.S. 471 (1963).

14 Gregg v. Georgia, 428 U.S. 153 (1976).

15 Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992) (plurality opinion).

16 Roe v. Wade, 410 U.S. 113, 159 (1973).

17 Griswold v. Connecticut, 381 U.S. 479 (1965).

18 Roe v. Wade, 410 U.S. at 164.

19 Stanley v. Georgia, 394 U.S. 557 (1969).

20 U.S. CONST. Art. IV, § 1.

recently found by the Second and Ninth Circuits[21] and the absence of a right to sue on behalf of an unborn baby accidentally killed by an amniocentesis needle in a Florida hospital. And finally, the rights of people who "couple" for reasons other than the traditional or natural purpose of procreating and raising a family.

These are all fascinating subjects, but they involve much more than legal and constitutional rights that can be asserted or denied. They involve challenges to fundamental truths and values, and this is where lawyers have to draw the line.

As a judge, I have no choice but to apply the Constitution as it is interpreted by the Supreme Court. Thus, regardless of my personal opinions about drugs and drug abuse, pornography, religious expressions in public places, suppression of evidence, prisoners' rights, or liberty and privacy interests, such as the right to an abortion, I must apply the law. As lawyers you too must confront the law as it is. On behalf of a client you can challenge its constitutionality. You can use precedent to argue for an interpretation of the Constitution or a statute in a way that conforms with the interests of your client.

But what do you do when you encounter something that is blatantly wrong but nevertheless protected by the law? If it is simply a bad law, or an area that is not presently covered by the law, you can participate in the legislative process and get a law passed, amended, or repealed. As a former legislator, I strongly encourage you to take that path. Frankly, that is the easier solution. When some activity that is blatantly wrong also is protected by the Constitution, your job is more difficult, but it is one that you must perform.

Over the years, I have felt that lawyers too often avoid controversy outside the courtroom. Because of fear of offending clients or members of the firm, lawyers frequently take a low profile when a controversial issue descends on their community. To confront this dilemma, you must order your own priorities. Before you become submerged in asserting newly-discovered rights for your clients, you have to be secure in your primary foundations in life—your faith, your family, and your community.

Eleven years before the Constitution was drafted, our forefathers declared our independence by professing entitlement to "the Laws of Nature and of Nature's God."[22] "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness."[23] Our founders recognized that before they could set up a government they first had to acknowledge the God-given rights that were inherent in every person. Likewise, lawyers, before setting up and engaging in their law practice, must first understand and acknowledge God's law—which to say that they must have a simple understanding of what is right

21 Quill v. Vacco, 80 F.3d 716 (2d Cir.), *cert. granted*, 64 U.S.L.W. 3795 (U.S. Oct. 1, 1996); Compassion in Dying v. Washington, 79 F.3d 790 (9th Cir.) (en banc), *cert. granted sub nom.* Washington v. Glucksberg, 65 U.S.L.W. 3085 (U.S. Oct. 1, 1996).

22 THE DECLARATION OF INDEPENDENCE.

23 *Id.*

and wrong. My late father-in-law, Ed Murphy, who taught here at the Notre Dame Law School for thirty-seven years, said it very well:

> By giving serious attention to divine revelation, one looks at legal questions in a different light. If, for example, one recognizes God as the creator of human life and the only one with full authority to ordain how that life should be lived and when it may lawfully be taken, this will surely influence one's views on abortion, euthanasia, fetal experimentation, in vitro fertilization, capital punishment, and a whole host of other life-and-death issues. If from revelation one concludes that the family is the central governmental unit, this will affect one's thinking on parental rights in education, divorce, adultery, surrogate mother contracts, homosexuality, and many other matters. In brief, one will critique every legal proposal in terms of conformity to what is known of the law of God.[24]

After acknowledging God's law, a lawyer's next priority is family. Keeping your family intact is more important than your legal career. Achievement in the eyes of others will not compensate for failure in your home. And long-term success in the law will be enhanced if you first observe family values.

Finally, you have to recognize your obligation to your country, your community, and your fellow human beings. You will help yourself and your family by helping others. At this point your law career will naturally come into its own. Your other principles will dictate how you practice law. The legal ethics and jurisprudence that Notre Dame emphasizes will fall into place and ensure a fulfilling career in the law.

So when you are not holding forth in the law office or in a court of law, and some malady descends on your community, what do you do? When you have your first principles of faith and family in place, there is a lot you can do for your community. If a so-called adult bookstore is about to open in your neighborhood, you may recognize that the owner has a constitutional right to distribute and promote his pornography, albeit with some restrictions. But you also recognize that it is a serious blight on the neighborhood for many obvious reasons. If you feel that way, you should not hide, but instead should step forward and vigorously oppose something that you know is bad for your community.

If you are engulfed by a school system that promotes sex education that is devoid of any moral foundation because the administrator thinks such moral foundation would "promote religion," have the courage to step in and do something about it. Try something innovative, such as encouraging the school board to adopt comparative religion courses at various levels. Rather than having the school teach what is right and wrong, it would instead lay out a comparison of what various religions teach about right and wrong. A comparison of many such teachings will demonstrate that most religions substantially agree about basic moral truths and what is right and wrong. Perhaps for the first time students would be exposed to

24 Edward J. Murphy, *The Sign of the Cross and Jurisprudence*, 69 NOTRE DAME L. REV. 1285, 1291-92 (1992).

these moral principles and could engage in a healthy discussion that would involve genuine teaching, not preaching.

No matter how "protected" by the Constitution, lawyers need to let people in the community know that a legal "right" to do or not to do something is not a moral right. The Supreme Court has declared that a state may determine whether or not to enact capital punishment.[25] If you feel strongly about the issue, you should engage in the legislative process of determining whether a state should or should not have capital punishment. With regard to obscenity, the Supreme Court has stated that community standards should prevail.[26] When faced with that conflict, you should come forward as part of a community and assert your position. The Supreme Court has stated that the decision on abortion is a mother's choice, and not something the state can prohibit.[27] But you can still declare that abortion is wrong, and work to make alternatives available.

This brings us back to recent news—to the tobacco company prosecution, the abortion clinic murders, and the comatose rape victim and her baby. For years the tobacco companies have insisted that cigarettes and nicotine were not addictive. But insiders are suddenly proclaiming company executives knew all along that smoking was addictive and harmful. Now the discussion focuses on the demerits of tobacco and smoking. That was not always the case. After a tobacco company lobbyist contracted cancer he went public with his real story of deceit. In his lobbying efforts, he did not talk about tobacco. He talked about freedom. He spoke of the right of smokers to enjoy their leisure activities. It was their choice to smoke. Government should not interfere with that choice. The government should "stay out of my mouth, stay out of my lungs." Sound familiar? It's the same theme used by proponents of abortion, but for cigarettes the deception is not working. Instead, politicians, the press—yes, trial lawyers—and anyone else who can climb on the bandwagon are calling cigarettes dangerous. In other words, you may have a right to smoke, but smoking is bad, so you should quit, kids should be protected, and tobacco companies should pay.

In your own community you can institute the same transformation for abortion, pornography, or any other wrongful activity that is protected by the Constitution. Quit talking about "rights" or "choice" and start educating people about the evils of abortion. I thought it was obvious that smoking was an addictive health threat, but it seems some have just discovered this fact. Perhaps people who claim to be "pro-choice" truly do not know what occurs in the early stages of pregnancy. You can push for informed choice, such as requiring abortion doctors to show the mother the ultrasound picture of the beating heart of the baby they will soon abort. Then the right to "choose" becomes a real choice of life or death.

My wife is president of the Women's Care Center here in South Bend, and she related a story from one of her counselors. A young woman, whom

25 Gregg v. Georgia, 428 U.S. 153 (1976).

26 Smith v. California, 361 U.S. 147, 165 (1959) (Frankfurter, J., concurring).

27 Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 870 (1992) (plurality opinion).

we can call Julie, came to the center to get a free pregnancy test. Upon discovering that she was pregnant, Julie was despondent. Even after a strenuous counseling session Julie was ready to leave in order to set up an appointment at the abortion clinic. But as a consolation to the counselor for her time, Julie agreed to go to the hospital next door where she could obtain a free ultrasound. Even so, when she left things did not look hopeful. Several days went by. No news was probably bad news. But then, out of the blue, Julie called. The counselor cautiously asked if she had gotten the ultrasound. "Yeah, I did," she said. "My baby had the hiccups!" Julie decided to keep her baby.

Even those who label themselves "pro-choice" realize that the real choice is between life and death. Two years ago President Clinton nominated Dr. Henry Foster, Jr. to be appointed U.S. Surgeon General, perhaps with knowledge that Foster had performed abortions. But at an earlier time, even Foster knew that a life, rather than a "choice," was in the balance when a woman considered an abortion. In 1970 a young woman in Alabama and her husband became pregnant with their second child. As struggling young students she and her husband thought the last thing they could handle was another baby. The young woman approached Dr. Foster, her obstetrician and gynecologist, and asked if, as a family friend, he would abort her second child, even though to do so would have been illegal at that time. Dr. Foster told the woman: "You can handle this. This child is a blessing to you. I am not going to do anything to stop that." Twenty-five years later that unborn baby girl is a doctoral candidate in neuroscience. She now thanks Dr. Foster for rescuing her: "If he hadn't said what he did, I wouldn't be here. I guess he did save my life." Unfortunately, before and during his confirmation hearings Dr. Foster did not speak out for life and against abortion in the same vein in which he spoke to that young woman's mother three years before abortion became a "right."

The Supreme Court is not going to change the law on abortion. There will be no constitutional Human Life Amendment any time soon. So you cannot count on the courts to rescue the unborn. But an informed choice might be a reasonable alternative for all sides. Implementing such a policy may be one way you can deal with a right that protects an activity that is clearly wrong.

There is a distressing tendency to equate the existence of a right with the nonexistence of a responsibility; that is, to assume that if one has a legal right to do something, it is proper and even good to do it. As lawyers you must make this distinction: Certain rights protect activity that is clearly wrong.

You can use your legal background and your position in the community to help inspire a moral rebirth in a society that condones bad things. In law school you learn about rights and how to champion these rights, but when you encounter a "right" that protects a wrong activity, you need not and should not hide behind the "right." As a lawyer you should speak out against such wrongful activity. We know that with every right comes a responsibility. St. Thomas More was the quintessential lawyer. He made the ultimate choice between God and the king. Our oath as judges and your

oath as lawyers requires that we uphold the Constitution and the laws of the United States. But while we must practice the law and honor the Constitution, we also must practice our faith, protect our family, and serve our country. By putting first things first, lawyers can serve their clients by asserting legal remedies and enforcing constitutional rights. Above all, lawyers can genuinely improve society by knowing what is right and wrong under God's law, impressing those values on themselves and their families, and by example and outspoken advocacy impress those values on the community. By doing so you will uphold what is right, and at the same time identify and criticize what is wrong, all within the proper confines of your oath of office.