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ADDRESSES

The Equality Principle: A Foundation of American Law

*William J. Brennan, Jr.**

It is a privilege to meet with the families and friends of the Class of 1987. I, too, warmly congratulate the graduates on your achievement of this day.

If I were to ask you what particular memory you carry with you as you leave this fine law school, I would hope that most of you would answer that it is an appreciation of the enormous significance of the equality principle in explaining the extraordinary success of our constitutional democracy. For that principle is the rock upon which our Constitution rests. Any defense of a constitutional democracy must begin with the equality principle, for the equality principle of our Constitution facilitates important social and economic change; it acts as the springboard for the realignment of unequal political forces toward economic and social equality. It nurtures social mobilization; it can activate a quiescent citizenry and it can recognize new and different forms of social organization. It is this principle of constitutional jurisprudence

* Associate Justice, United States Supreme Court. This address was presented at the 1987 commencement ceremonies of the King Hall School of Law, University of California, Davis.

to which we gladly consented.

Consent to a rule of law implies a commitment to a set of shared moral values — a set of values that transcends the individual and that binds us to each other. In our society, it has historically been the courts that have interpreted and made acceptable this Rule of Law; the judicial pursuit of equality is, in my view, properly regarded to be the noblest mission of judges; it has been the primary task of judges since the repudiation of economic substantive due process as our central constitutional concern. This pursuit of shared moral values and their accurate translation in individual cases is what produced the United States Supreme Court decisions in *Brown v. Board of Education*,[1] *Baker v. Carr*,[2] and *Gideon v. Wainwright*.[3] We hear much these days of criticism that lawyers are abandoning their traditional role of protectors of the Rule of Law in favor of pursuit of the almighty buck.

May I ask you this? Have things really come around again to the situation that provoked Justice Stone to say of the legal profession in 1934 that "steadily the best skill and capacity of the profession has been drawn into the exacting and highly specialized service of business and finance" with the consequence that "at its worst it has made the learned profession of an earlier day the obsequious servant of business and painted it with the morals and manners of the marketplace in its most antisocial manifestation."[4]

I hope rather that the professions — practitioners and judges alike — still are concerned with providing freedom and equality of rights and opportunities, in a realistic and not formal sense, to all the people of this nation: justice, equal and practical, to the poor, to the members of minority groups, to the criminally accused, to the displaced persons of the technological revolution, to alienated youth, to the urban masses, to the unrepresented consumers — to all, in short, who have not yet really fully partaken of the abundance of American life. But the task of strengthening the principle of equality is no task for the short-winded. Who will deny that despite the great progress we have made in recent decades toward universal equality, freedom and prosperity, the goal is far from won and ugly inequities continue to mar the national promise? Much surely remains to be done. None of us in the ministry of the law, whether teacher, practitioner or judge, can deny that the law still tenaciously clings to the tradition that for so long isolated law from the

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[1] 347 U.S. 483 (1954).
[2] 369 U.S. 186 (1962).
[3] 372 U.S. 335 (1963).
[4] Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 7 (1934).

boiling and difficult currents of life as life is lived. Increasingly, however, and fortunately, more of us recognize that law must come alive as a living process responsive to changing human needs. We must continue to recognize that jurisprudence is best that constitutes

> a recognition of human beings, as the most distinctive and most important feature of the universe which confronts our senses, and of the function of law as the historic means of guaranteeing that preeminence. In a scientific age, law should ask, in effect, what is the nature of man, and what is the nature of the universe with which he is confronted? Why is a human being important; what gives him dignity; what limits his freedom to do whatever he likes; what are his essential needs; whence comes his sense of injustice?[5]

But of late one has the uneasy feeling that the profession, including the courts, are slowing down in the pursuit of the equality principle. Because of burgeoning dockets, as has been said by Dean Redlich of New York University:

> It seems that the standard fare for leading jurists in both the federal and state system is to bemoan the fact that too many issues are being brought before the courts, that they take too long to try, that discovery is abused, that judges are being asked to decide issues which no other country on earth would consider placing before a court, that the quality of the product has declined as the workload has increased, and that something must be done — either create another court, give us more judges, give the work to some other court, speed up the process, or, better still, take the matter out of the courts into some other system.[6]

Why are so many more people pounding on our courthouse doors? The answer is, of course, that "law suits don't emerge from a vacuum. It seems very clear to me that it is impossible meaningfully to discuss the litigation crisis without considering at the same time the twin revolutions in science and technology and in social expectations."[7] For these have come together to create radical upheaval in American values and to generate vast new legislative and social conflict. And where do Americans turn for resolution of their differences? Why, of course, as always, they turn to the courts. We have been a legalistic society from the beginning, and to go to court is an ingrained habit in our society. We place a premium on the value of dissent, not, as in other countries, upon the value of consensus. From our beginnings, governmental action

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[5] Rooney, *Report of Committee on New Trends*, 1964 A.B.A. SEC. INT'L & COMP. L.

[6] Address by Dean Norman Redlich, New York University School of Law Convocation Exercises, May 26, 1983 (unpublished).

[7] Address by David L. Bazelon, Senior Judge, D.C. Circuit Court of Appeals, University of Washington Commencement Ceremony, June 11, 1983 (unpublished).

that in other societies is exclusively the purview of administrators or legislators is, in America, subject also to judicial scrutiny. The diversity of our people, combined with their ingrained sense of justice and moral duty, has caused this society to frame urgent social, economic and political questions in legal terms — to place great problems of social order in the hands of lawyers for their definition, and in the hands of judges for their ultimate resolution. The almost incredible intricacy and pervasiveness of the webbing of statutes, regulations and common law rules in this country that surrounds every contemporary social endeavor of consequence give lawyers and judges a peculiar advantage, as well as responsibility in coming to grips with our social problems. They alone — or so it sometimes seems — are charged by this society to penetrate directly and incisively to the core of a problem through the cloud of statutes, rules, regulations, and rulings which invariably obscure it to the lay eye. The society for this reason has come to believe that the lawyer and judge in America are uniquely situated to play a creative role in American social progress. Indeed, I would make bold to suggest that the responses of the profession during my tenure on the bench for over thirty-seven years to the challenges of what was plainly a new era of crisis and of promise in the life of the nation often proved decisive in determining the outcome of the social experiment on which that nation was embarked. We must remember, too, the great change in the identity of the consumers of justice in every one of the fifty states. Judge Bazelon noted:

> For years the American justice system operated exclusively for those who were wealthy enough to afford it: even today, the difference in the quality of representation received by those who are rich and those who are poor is shocking. Criminal defense of the indigent is hopelessly inadequate much too often. Public interest organizations and legal services corporations held some promise for providing access to the courts for the poor in civil cases, but funding cutbacks are threatening even the small gains that have been made in this area.
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> Nevertheless, some of the poor, the disadvantaged, the disenfranchised are taking their causes to court. The number of civil rights suits filed annually in the federal courts, excluding suits by prisoners, has grown more than fifty-fold since 1961. For nearly two hundred years of this nation's history, few blacks, hispanics or Asian-Americans, to name only a few of the victims of oppression, would have thought of taking their claims to court; they knew they would receive at best an inadequate hearing there. But today, the expectations of the disadvantaged, as well, we hope, as the sensitivity of our society to their plight, have been heightened. Discrimination and second-class treatment will no longer be patiently endured, quietly tolerated. The victims of racism, sexism, and poverty, the aged, the physically and mentally disabled, are demanding that they be heard, and they are increasingly turning to the courts to demand redress of funda-

mental injustice. And they need lawyers — good lawyers — to help them. And the present increase in litigation from this corner of our society is only the tip of the iceberg. As President Bok of Harvard pointed out, "beneath the visible mass of litigation lies a vast accumulation of festering quarrels and potential suits that never come to court because of fear, ignorance, and the inhibiting costs of legal services."

If the so-called litigation crisis is due in any significant part to the increase in social expectations of the disadvantaged and to society's growing sensitivity of such issues, and I believe it is, then in my opinion the increase in litigation is a healthy one, and in keeping with the best American tradition, judicial economy must not be purchased at the price of justice. Addressing the underlying problems that are at the heart of this crisis will be costly, but it is the only long-run solution.[8]

And, as Dean Redlich trenchantly observed:

For reasons which the critics do not seem to understand, the people still want to take their case to court — those inefficient, lawyer-dominated, judge-ruled, discovery-plagued, slow-moving, unpredictable courts. I think that the American people, to the great credit of our profession, turn to the courts because it is just about the only agency of government that they can still trust. Judges and juries may be inefficient, they may sometimes be stupid, and even wrong, but instinctively the American people feel that there is one thing that judges are not. They are not bought. With all of the problems in the system, it still involves a process where a claim can be asserted, a defense raised, and judges and juries will make an honest attempt to resolve the dispute on the merits.

And, as we look critically at the justice system, we should not fall into the habit of judging it purely in procedural or mechanical terms. During the days of Earl Warren, we did not seem to evaluate the justice system solely in terms of the numbers of dispositions, the average length of the criminal trial, the number of days it takes to select the jury, or the length of the backlog. It is, of course, true that justice delayed is justice lost. But it is also true that injustice in a hurry is still injustice.

The justice system ought to have a substantive agenda, as well as a procedural agenda. I do not here carry a brief either for a liberal or a conservative position. I am simply suggesting that leaders of the Bench and Bar, while they address issues of judicial administration, have a correlative duty to address some of the great substantive issues that face the courts — problems of the environment, of the structure of our political system in an age of soaring costs, of the need to preserve religious freedom and the separation of church and state, of the role of the courts in dealing with the problems of aliens, race, sex, personal autonomy, the prison system, the aged, inequalities of opportunity, access to legal services, concentration of economic power opportunity, and the protection of the privacy and inventiveness in an electronic age. These, and many others, head the agenda of the justice system — not the workload of the Supreme Court.[9]

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[8] *Id.*

[9] Address by Dean Norman Redlich, *supra* note 6.

Yes, equal justice under law, an immensely moral concept, is the very cornerstone of our American concept of justice, and will remain so for as long as courts function in its service. If we are to be as a shining city upon a hill, it will be because of lawyers' ceaseless pursuit of the constitutional ideals of human dignity. For the political and legal ideals that form the foundation of much that is best in American institutions — ideals jealously preserved and guarded throughout our history — still form the vital force in creative political thought and activity within the nation today. As we adapt our institutions to the ever-changing conditions of national and international life, these ideals of human dignity — liberty and justice for all individuals — will continue to inspire and guide us because they are entrenched in our Constitution. The Constitution with its Bill of Rights thus has a bright future, as well as a glorious past, for its spirit is inherent in the aspirations of all Americans. You who will be entering the profession today will never forget, I am sure, that, as lawyers, the primary responsibility for maintaining and furthering the American dream is being passed on to you. Safeguard and cherish it.