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## Annual Luncheon Address: California Western Law Review

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# CALIFORNIA WESTERN LAW REVIEW

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## “A Case for Moderation”

### *California Western Law Review Annual Luncheon*

JUSTICE FRANK K. RICHARDSON\*

It is a great privilege to be permitted to share in the annual luncheon of the California Western Law Review. In any season, it is always a pleasure to visit this warm and beautiful city of San Diego and particularly in the wettest winter in Northern California in recent memory. As I speak today, I am well aware of that cynical suggestion of some wag that “If all of the luncheon speakers in the United States were laid end to end, it would be a very good idea.”

I do not bring any burning message. I am not here to discuss Proposition 8.<sup>1</sup> I do not offer any profound thoughts on court reform. Rather, I wanted to share with you some general, perhaps random, observations about law and lawyers. I sense today that there are veteran judges and practitioners or teachers among you as well as younger practitioners and students connected with the California Western Law Review and the law school. Law reviews traditionally live in a world of pure abstraction which nicely balances theory with reality. In this connection, perhaps those of you on the law review have heard of the two law review editors who

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\* Associate Justice, Supreme Court of California. A.B., with distinction, Stanford University, 1935; LL.B., Stanford Law School, 1938. Phi Beta Kappa. Justice Richardson retired December 2, 1983, after nine years of service on the California Supreme Court. *See*, L. A. Daily J., Nov. 7, 1983, at 1, col. 6, for a detailing of Justice Richardson’s career and excerpts of some of his major opinions.

[Note: The Honorable Justice’s remarks were delivered at the annual California Western Law Review Luncheon, March 18, 1983, San Diego, California. The Board of Editors of the California Western Law Review has added footnotes to the transcript of the address to aid the reader’s understanding. Additionally, in performing necessary textual editing, the editors unavoidably have altered the presentation from its verbatim form; the Board, however, has sought to minimize such alterations].

1. Proposition 8, enacted by popular vote of the California general electorate in 1982, is popularly known as the “Victims’ Bill of Rights” and is codified at CAL. CONST. art. I, § 28(d).

were trapped in a well. One turned to the other and said, "O.K., assume a ladder."

We older veterans although in the late afternoons of our careers remain very interested in what is happening to the profession, for we are part of it. We have raised our families and in between the ulcers and high blood pressure the law has been good to us. Even though, in a sense, we are on the professional sidelines, to use the classic expression of Yogi Berra,<sup>2</sup> "You can observe a lot by just watching." If you will excuse just a brief personal word—when I joined the bar forty-four years ago, lawyer referral services were informal and disorganized. Solicitation was strictly verboten, and advertising was for new automobiles and breakfast cereals. Specialization was practiced, but it was neither publicized nor controlled. Gasoline prices rose from thirteen cents to seventeen cents per gallon and an excellent meal cost \$1.50. In those dim, distant days beyond recall, there was even adherence to a doctrine we called *stare decisis*.

It has been given to you and me to live out our professional years in a period of intense ferment. The tides of change have swept over the law. There is an ancient Chinese curse—"May you live in interesting times." It is perhaps small comfort that almost all other disciplines and institutions have come under the skeptical eye and dissection of intense critics. This has been true of business and education, of governments at all levels, of medicine, religion, and of labor. Specifically, law and the courts have been the subject of a rolling barrage of criticism. Lawyers and judges are the targets of much mistrust and cynicism. We are not a popular breed. There are reasons for that. Whenever litigants enter a courtroom, one side wins and one side loses. Litigation is not an endearing experience, and the cumulative effect of this is a hard core of dissatisfied, disaffected citizenry. The law for most people means restraints on behavior and this adds up to resentment and disappointment. So, we must not be surprised that as a profession the public does not hold us in the highest regard.

If it is any comfort to you, this hard fact of life is not new. Recently former Senator Thomas Kuchel<sup>3</sup> referred to a census which had been taken in Grafton County, New Hampshire in the

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2. Lawrence Peter (Yogi) Berra was a famous baseball player, coach, manager and personality. He was elected to the Baseball Hall of Fame, 1972. 1 A. MARQUIS, WHO'S WHO IN AMERICA, 1982-83 257 (1982).

3. Thomas H. Kuchel was a member of the California State Assembly (1937-1940); California State Senate (1940-46); United States Senator for California (1953-1969). He was a former member of the United States Senate appropriations interior and insular affairs committees. A.B., cum laude, Univ. of So. Calif. 1932; J.D. 1935, Univ. of So. Calif. 1 A. MARQUIS, WHO'S WHO IN AMERICA, 1982-83 1888 (1982).

year 1773, before we had become a new nation. This is part of the census: "We have a county of over 3,000 square miles, a population of 6,549 souls of which 90 are students at Dartmouth College and 20 are slaves. We have 25 incorporated towns all in a thriving condition, including 4 grist mills, 5 saddle shops, 7 millwrights, 8 physicians, 17 clergymen and not a single lawyer. For this happy state of affairs we take no credit unto ourselves, but render all to the glory of God." We have never been included among the saints.

Having acknowledged this, I would like, with your permission, to interject a couple of personal observations which run against the popular grain. I confess to a very strong bias, generated by many years of close professional observation. I like lawyers. I like their courage and audacity. I like their willingness to work hard, frequently in lost causes, and their loyalty to their clients through thick and thin. I like their comradery. I like the intellectual stimulation which surrounds their work, whether in the office or courtroom. I like their generosity of time and talent. I like the universality of a lawyer's work, touching as it does almost every aspect of human existence. I like the importance of the work they do, and their ingenuity, and the opportunities for innovation and creativity. I like the power which they possess to start and stop official machinery and to affect its direction. I like the high ethical standards by which almost all of them live, and am very proud of the enormous contribution they have made in our nation's history.

In complete candor, I must say that there are some things that, growing older, I don't like about the profession. One of them, inherent in the adversary nature of the job itself, is the almost constant aura of contention and combat in which we live. Although the law in its goals and symmetry may be likened to a beautiful woman, I am reminded of the poet who said that "my wife is too beautiful for words but not for argument." Another difficulty is the pressure of time and volume that hinders the craftsmanlike work of drafting and trial preparation that have always been the hallmarks of good lawyering. Yet another is the seeming vagueness about much of what we do. We frequently deal in generalities. Justice Holmes<sup>4</sup> once observed that "[L]awyers spend a great deal of time shoveling smoke." We verbalize a lot. Our tools consist of thinking and language and per-

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4. Oliver Wendell Holmes served as an Associate Justice, United States Supreme Court (1902-1932); Chief Justice of the Supreme Court of Massachusetts (1899-1902), and Associate Justice of the Supreme Court of Massachusetts (1882-1899). Author of the *American Common Law* (1881). Elected to American Hall of Fame, 1965. WEBSTER'S BIOGRAPHICAL DICTIONARY 723 (1980).

suasion. We use neither the surgical scalpel nor the engineer's slide rule. Rather, someone has said of us, poetically, that "We live in a sea of words where the nouns and adjectives flow. Where the verbs speak of action that never takes place and the sentences come and go."

Within a different context, those same difficult burdens of contention, pressure and vagueness which are borne by the advocate rest equally upon judges.

It is perhaps useful for judges, periodically, to ask themselves a simple question. What are we trying to do? The short answer is that we seek to do justice on a case-by-case basis. The true function of courts has been debated since the founding of our nation over 200 years ago. The controversy still rages, much of it functional, focusing on whether the court's true role is that of narrower constitutional or statutory *interpretation* or rather that of a broader *policy* determinant. The constitutional founders debated the role of the judiciary within the context of proposals that the courts become parts of either the legislative or executive branch. They decided that they would be neither, but rather a third branch of government *independent* of the two other policy making branches. The Founding Fathers saw the danger of unbridled judicial power, however, and limited that power through both the federal Constitution and the Bill of Rights.

Acknowledging the impossibility of fixing a permanently satisfying line between proper restraint and impermissible excess, we may be aided by identifying several areas in which courts may have crossed the line. Echoing Lord Macaulay's<sup>5</sup> words, "[A] government that attempts more than it ought ends up accomplishing less than it should." It is my view that courts should decide the issues in individual cases rather than expansively seek perfect justice by developing good social policy. Restraint is a necessary part of an ordered life, whether it is a diet for the physical body, or self-control in our personal habits.

In the judicial context, two areas are particularly troublesome: courts that exceed their competence in the making of broad policy decisions, and procedural devices which are aimed at realizing perfect justice.

In this connection, it is relatively easy to agree with the principle of judicial restraint in the abstract. It is the application that

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5. Lord Thomas Babington Macaulay was an English writer and statesman. He was a member of the Supreme Council of India (1834-1838); Secretary of War (1839-1841); and Paymaster of the Forces (1846-1847). Author of *History of England* (vols. I and II, 1848; III and IV, 1855; V, 1861); *Lays of Ancient Rome* (1842) and numerous essays. WEBSTER'S BIOGRAPHICAL DICTIONARY 935 (1980).

causes the difficulty. The mother of a small boy, having asked him if he liked asparagus, was assured that he did. After having served him a portion and noticing that the boy had not eaten any, his mother said, "I thought you said you liked asparagus," to which he replied, "I do, but not enough to eat it!" Similar reasoning may be at work in the matter of judicial restraint.

I suggest at least five reasons which counsel general moderation in the decisionmaking process. First, appellate courts traditionally lack real expertise in general social, economic, and technical areas. Courts and their staffs are seldom equipped to handle well many of the intricate technical problems which are laid at our doorstep. We have neither the ability nor the time within which to summon expert witnesses, or fashion solutions formulated on a satisfying factual record. The light which is cast by a legal education supplemented by a handful of treatises and law reviews frequently cannot penetrate all of the dark corners of these problems. Enthusiasm is not a substitute for knowledge. Courts will do well to heed Justice Frankfurter's<sup>6</sup> suggestion "to decide the concrete issue and not embarrass the future too much."

Second, courts are usually poorly equipped to predict with accuracy the long range effects of our more far-reaching decisions. Our adoption of broad new reforms may produce foreseeably satisfactory results in a given case, but may also bring unwitting confusion, uncertainty, chaos and unanticipated and undesirable side effects as applied to future cases which factually may be a little different.

Third, if we fail in these judicial experiments it may prove to be very difficult to undo our mistakes. The legislature may be too preoccupied to correct every error. Moreover, we cannot expect Sacramento to act as a monitoring station or a juridical safety net for the courts. We have a dramatic historic illustration in the Supreme Court's holding in its Dred Scott decision.<sup>7</sup> The high court struck down the Missouri Compromise, a law of Congress, and ruled that blacks were not citizens and had no right to sue in federal court. It took more than another act of Congress to correct the mistake—it took the most destructive war in history and three constitutional amendments.

Fourth, and in a similar vein, a *hyperactive* court may stimulate a counterproductive overreaction by its critics. And if the legislature is sluggish in responding there may be either a direct popular

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6. Felix Frankfurter served as an Associate Justice, United States Supreme Court (1939-1962); Professor, Harvard Law School (1914-1939). WEBSTER'S BIOGRAPHICAL DICTIONARY 551 (1980).

7. Dred Scott v. Sandford, 60 U.S. 393 (1856).

reaction through the initiative or alternatively if the legislature does react it also may react to *correct* a perceived imbalance, but in doing so tip the scales going too far in the other direction.

Fifth, in my view is the danger of ignoring those who usually are most directly affected in a judicial rush to achieve *reform*, namely, the people. Under our constitutions, state and federal, it is the *people*, either directly or through their legislative representatives, not the courts which are entrusted with the responsibility of making broad policy decisions. Judges are not "philosopher kings or queens" blessed with any divine vision or possessed of perfect blueprints for a better society.

In a similar fashion, courts can try but they cannot accomplish perfect justice. If a physicist or a cabinetmaker seeks perfection in his work he may not achieve it, but in making the effort he will thereby elevate his standard and improve the quality of his performance. This same principle does not necessarily apply in the judicial arena. Procedural devices which are aimed at avoiding every conceivable judicial error have real social costs which can weigh heavily on the balancing scales of justice, especially in the criminal area. When a convicted criminal is released on a technicality, justice suffers in the public perception of a failing judicial system. When citizens observe that punishment for criminal conduct at any level is neither swift nor certain, justice suffers. The deterrent effect of enforcement is diluted and eroded by interminable delays in convicting, sentencing, and imprisoning.

We need not herald our mistakes nor should we attempt to hide our fallibility. Courts cannot do perfect justice nor should we expect them to. As Justice Holmes once noted, "Every year if not every day we have to wager our salvation upon some prophecy based on imperfect knowledge." Justice Learned Hand<sup>8</sup> agreed, observing "[D]ue process does not mean infallible process." Recently retired appellate Justice Macklin Fleming in his provocative volume *The Price of Perfect Justice*<sup>9</sup> documents vividly the social cost we are paying for our inability to distinguish between perfect procedure and effective procedure. Using many examples, he urges that we broaden our understanding by balancing the costs of striving for perfection against the rewards of such behavior.

It is possible that by striving for perfection where perfection is

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8. Learned Hand served as a Judge, Federal Circuit Court of Appeals (1924-1951) and Federal District Court (1909-1924). Often called the "Tenth Justice of the Supreme Court." He delivered more than 2,000 opinions and gained a reputation as a defender of free speech. THE NEW COLUMBIA ENCYCLOPEDIA 1187 (1975).

9. M. FLEMING, *THE PRICE OF PERFECT JUSTICE—THE ADVERSE CONSEQUENCES OF CURRENT LEGAL DOCTRINE ON THE AMERICAN COURTROOM* (1974).

not possible, courts accomplish less overall justice than they should. The historic and periodic swings of the legal pendulum from stability and tradition to innovation and change prompted one distinguished modern political scientist to comment recently that age had taught him to develop politically and legally what he called a "passion for the center."

Perhaps we would all gain if courts generally entered upon a juridical diet, exercising a more restrained function, and leaving policy judgments to those branches which are both equipped to make them and which also are directly responsible to the people who are ultimately affected by those judgments.

There is a large zone in which courts can improve. We can do better in the handling and processing of both civil and criminal trials. We can move civil cases to trial in less than five years, while preserving the precedence of criminal trials. We can select a jury in a capital case in less than six months. We can improve on a system that requires repeated appellate examination of identical evidentiary or procedural issues. We should be able to dispose of a search and seizure issue in less time than four years after it arose. We can devise a fair system of accommodation and deference between the federal and state systems which will save substantial expenses and prevent a good bit of game playing. I have no doubt that our British cousins could teach us much if we would listen.

Will Rogers<sup>10</sup> had a friend who told him that he knew how to spell "banana but didn't know how to stop." Courts of law should explore their limits, do what they can effectively, but know how to stop. I hope I also know how to stop, and I conclude with this observation directed particularly at the younger practitioner and law students.

Bombarded as the public is by negative impressions of lawyers, their big fees, their alleged deviousness and adroitness, it seems to me high time that a voice was raised in ringing praise of lawyers. Although I never met a lawyer who was a literal saint, I have met and known scores of them who were and are high principled, hard working, honest, contributing professionals. They discharge faithfully and with honor the highest positions of trust. They are fiduciaries in the best sense. They betray no confidences. They put the interests of their clients above their own. They give of themselves in nearly hopeless causes. They are loyal to their families.

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10. Will Rogers was an American humorist. He was a performing artist in vaudeville in 1905 and the Ziegfeld Follies in 1915. He was known as the "Cowboy Philosopher," gaining a wide audience through motion pictures, books, radio, and a syndicated newspaper column. *THE NEW COLUMBIA ENCYCLOPEDIA* 2343-44 (1975).

They are protective of the poor and the ravaged as well as the rich and powerful. Frequently, they stand alone, and as protectors of the constitutional rights of the unpopular, become human lightning rods who take the abuse of the unknowing. They break new ground and they clear new paths for the movement of the law, frequently failing four times before they succeed once. I dare say, with particular reference to the San Diego Bar, that there is a prodigious amount of pro bono publico work that is rendered by San Diego lawyers to community service organizations, and youth, church, and civic groups. This work is done without fanfare or a dime of compensation and is often done while the lawyer manages a heavy workload. The work has been going on quietly for years in the finest traditions of the American lawyer and the public should hear about it occasionally. I am very proud to have been a lawyer and you should be too.

The real test for the bench and bar in the coming years will be in the sustained quality of their competency and character. We will demonstrate this not so much by our words as by our conduct. Truly for these few years, this brief moment in history, it is given to us, our generation of lawyers and judges to be the temporary custodians of that priceless jewel in the crown of freedom—the rule of law, to preserve the rule and to make it work amid the vast economic, social and technical pressures of a complex and troubled age. That is a task to test the strength of anyone, and of any time. In a period of considerable individual and collective violence we work in a system of ordered liberty which no doubt is flawed and we can improve it. However, we who work in that system should always bear in mind that it is a very rare but essential component of that veneer of civilization, though thin, nonetheless protects us all.

I am grateful to you new friends for the privilege of sharing this luncheon today and I wish for each of you continued success.

Thank you so much.