Earl Warren The Crisis in American Justice

Reprint of an address by

The Honorable
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I AM HAPPY to be with you today to participate in your Institute on "THE CRISIS IN AMERICAN JUSTICE."

We are, indeed, in a crisis. We have had many crises in prior years, but none within the memory of living Americans which compares with this one. A number of factors contribute to it — war, inflation, unemployment with resulting poverty; a deterioration of our environment; an atmosphere of repression; and a divisiveness in our society to a degree of intensity that has not been equalled in the past hundred years.

There are many causes of the crisis, but none I believe as basic as our neglect in reaching the ideal we fashioned for ourselves in the Declaration of Independence that "All men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness." Another is our failure to enforce adequately the first Section of the Fourteenth Amendment to the Constitution which reads —

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

If the letter and spirit of these injunctions had been observed everywhere in the United States, many of the factors I have just mentioned would be non-existent today, and those remaining would, in all probability, be manageable. Unfortunately, such has not been the

case, and our problems have grown in size and intensity with the result that we are now torn by distrust, frustration and dissent. These things have resulted in a weakening of the sentiments which have made our country great — a belief in our institutions; faith in mankind; hope for the future; and the urge to succeed through togetherness in making this a better place in which to live, not only for ourselves, but also for those who are to follow us.

Our Nation stands at a crossroads. As we face the future, we must make a choice on which we will travel. One leads to that plural society to which we rededicate ourselves whenever we repeat the Pledge of Allegiance —

"I pledge allegiance to the flag of the United States of America and to the republic for which it stands, one *nation under God, indivisible, with liberty and justice for all."*

That road leads to unity of the purpose and action which will make life meaningful for all. The other road would divide us into segments of discontented people with a divisiveness that leaves no room for the happiness and contentment of the children of any of us in the foreseeable future.

I say these things to you, not by way of criticism either of your organization or yourselves, but as an affirmance of my faith in the rightness of what you are doing. I came here for the purpose of expressing my appreciation for the work you have been doing through the years, and to say to those who support you with funds that their money could not be contributed to a better cause.

For over 30 years you have fought the good fight and have done so much of the time alone but always within the compass of our institutions. During almost half of that time, I sat on the Supreme Court listening to the arguments

of your counsel; reading your briefs; and deciding the cases which never would have reached us for decision had it not been for your participation.

I CAME TO THE SUPREME COURT almost seventeen years ago, and on arrival found on my desk the briefs in *Brown* v. *Board of Education* and its companion cases. Only a few weeks later, I heard the arguments of your then counsel, later my colleague, Thurgood Marshall, and the counsel for the several States who were defending the false doctrine of "separate but equal" which had led millions of black Americans almost to a point of complete despair. During the following sixteen years, there were few, if any, months in which cases were not presented either by Justice Marshall while counsel or by Jack Greenberg, James M. Nabrit III, or some other member of your legal staff. Every case they brought to us was an important one, and one that affected, not only the black population, but also every minority group in the Nation.

I do not recall the number of cases won or lost by them, but my recollection is that the percentage of victory was overwhelming. I do remember, however, that at the time Thurgood Marshall was appointed to the Supreme Court, it was stated in the press that he had won 29 out of 32 cases before the Supreme Court. That record in itself is ample testimony of the worthwhileness of your cause.

I will not attempt to discuss with you the advances which have been made during the existence of your Fund. You know as well as I do what those advances have been. I will say this, however, important as they have been, they leave in their wake a long list of things still to be done before we can honestly say that we

have achieved the substance of the inscription over the entrance to the Supreme Court Building — *"Equal Justice under Law."*

I do believe that open defiance of the 14th Amendment has been laid to rest, and that no longer can any State say that it will act in direct opposition to it. On the other hand, the ingenuity of recalcitrants and the sly devices for discrimination are so insidious that the integration of our society must remain the dominant issue for those who believe in the basic principles of our institutions and the justice we proclaim as our objective. In all our efforts, we should remember that constitutional protections are more likely to be lost through the indirectness of erosion rather than through an open assault.

It has been well said that the words of a constitution mean nothing unless some lawyer has the courage to stand up in a court room and fight to give them meaning. That is what you have been doing through the years, and that is the reason I am so happy to come here today to give furtherance to your cause.

AS EVIDENCE OF EROSION, I will cite one striking instance of it. Almost 100 years ago, in the case of *Strouder* v. *West Virginia,* 100 U.S. at 303, the United States Supreme Court held that systematic exclusion of Negroes from juries is unlawful because it is *"practically a brand upon them fixed by law; an assertion of their inferiority and a stimulant to that race prejudice which is an impediment to securing to individuals of that race that equal justice which the law aims to secure to all others."*

Notwithstanding this landmark decision, many cases of this character have come to our Supreme Court even during my years there, some of them which we reversed and others

which we could not because the issue was not adequately raised in the courts below, either for the reason that the petitioner was indigent and did not have the means to prove the discrimination under the ingenious devices used to accomplish that purpose or because the white lawyers did not raise the issue.

ONLY A FEW YEARS AGO a case of this kind came to the Fifth Circuit Court of Appeals from the State of Mississippi (*United States* v. *Harpole*, 263 F. 2nd 71). It was from a county where the majority of the people were black. The defendant, charged with murder, was represented by two white lawyers. A completely white jury was selected, and the defendant was convicted and sentenced to death. No question was raised concerning the systematic exclusion of Negroes from the jury, and the conviction was affirmed by the State Supreme Court.

When the case was concluded in the state courts, the white lawyers took no further proceedings, but an eminent Negro trial lawyer from Chicago raised the question in federal collateral proceedings. The Court of Appeals remanded the case to the United States District Court for a hearing of the evidence on the issue. That evidence showed that, although Negroes were in the majority in the county, no Negro had served on any jury panel within the last twenty years in the memory of the sheriff, or any other public official in the county, or any witness who testified. The District Court decided against the defendant.

In reversing the case, the then Chief Judge Rives of the Court of Appeals stated:

"As judges of a Circuit comprising six states of the Deep South, we think it is our duty to take judicial notice that lawyers residing in many southern jurisdictions rarely — almost to the

point of never — raise the issue of systematic exclusion of Negroes from juries."

This in spite of the fact that other Negroes have gone to their death or prison condemned by juries of white persons only.

Chief Judge Rives also pointed out that the conduct for which he reversed the case was in direct violation of Title 18 of USCA (United States Code, Annotated), Section 243, which reads as follows:

"Exclusion of jurors on account of race or color — No citizen possessing all other qualifications which are or may be prescribed by law, shall be disqualified for service as grand or petit juror in any court of the United States or of any state on account of race, color or previous condition of servitude; and whoever being an officer or, other person charged with any duty in the selection or summoning of jurors excludes or fails to summon any citizen for such cause shall be fined not more than $5000."

This statute has obviously been honored in its breach rather than in its observance because there is no case cited under it in the Annotated Code. I wonder if the time has not arrived where some such citations under the statute would give life and meaning to it.

THERE ARE ALSO in that same part of the country many court rooms which are still segregated and where witnesses are demeaned by the treatment they are accorded. Again I give you one instance of such treatment.

Only six years ago there came to the Supreme Court a case of this character wherein a white lawyer, who had been addressing white witnesses as Mr. and Mrs., commenced to examine a Negro woman. The following is the entire record in the case on an agreed statement of facts*:

"Cross examination by Solicitor Rayburn:

Q. What is your name, please?

A. Miss Mary Hamilton.

Q. Mary, I believe — you were arrested — who were you arrested by?

A. My name is Miss Hamilton. Please address me correctly.

Q. Who were you arrested by, Mary?

A. I will not answer a question —

By Attorney Amaker: The witness's name is Miss Hamilton.

A. — your question until I am addressed correctly.

The Court: Answer the question.

The Witness: I will not answer them unless I am addressed correctly.

The Court: You are in contempt of court —

Attorney Conley: Your Honor — your Honor —

The Court: You are in contempt of this court, and you are sentenced to five days in jail and a fifty dollar fine."

The judgment was affirmed by the Supreme Court of Alabama, and on review in the Supreme Court of the United States, the Attorney General of that State argued that the "federal question is not substantial, is not important, and is frivolous." The Court did not agree with him and reversed the conviction. (*Hamilton* v. *Alabama*, 376 U.S. 650)

THESE ARE INSTANCES of what I call erosion of constitutional principles because there is no law which compels or authorizes a judge or lawyer to act as they did in these cases. The oppression was occasioned by racist feelings in

**Hamilton* v. *Alabama* was taken to the Supreme Court by Legal Defense Fund lawyers. Miss Mary Hamilton was an officer of CORE.

total disregard of the Constitution. As long as such conditions exist in any court in the Nation, we cannot expect private citizens to accord to the black people of our country the human dignity to which all are entitled.

If I were not speaking to you at this time, I would have been in Detroit today. I was invited by the family of the late lamented Walter Reuther to attend the Memorial Services being held for him in that city. I called the family and explained to Mrs. Victor Reuther, when her husband was not available, what my dilemma was. Her reply was, "I can understand your situation, and I am sure that Walter would have you fulfill your speaking engagement because he believed that things must go on, and he was profoundly interested in the work of the Legal Defense Fund." I can add to that that I believe he would have tried to be here himself because he told me he would endeavor to do so when I visited with him at a recent dinner of the Detroit Chapter of the National Association for the Advancement of Colored People where 4200 people were in attendance. You have lost a good friend in Walter Reuther as has the Nation because he was a leader of men and devoted to the causes which are essential to keeping America great.

He was with you in your fight to the end, and would, I am sure, have continued to be by your side as long as he might have been permitted to live.

And so I hope today as we leave this gathering you will all say, "We have just begun to fight," and also that the fight will continue until every man, woman and child in this Nation is accorded the human dignity and equality under the law which is the heritage of all of us.

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