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ADDRESS BY THE HONORABLE BYRON R. WHITE, ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT

In the preface to his *Defense of the Constitution*, published in 1788, John Adams said:

"The arts and sciences, in general, during the three or four last centuries, have had a regular course of progressive improvement. The inventions in mechanical arts, the discoveries in natural philosophy, navigation, and commerce, and the advancement of civilization and humanity, have occasioned changes in the condition of the world, and the human character, which would have astonished the most refined nations of antiquity. . . . Even in the theory and practice of government . . . considerable improvements have been made."

And so it has been before and since. Perhaps the very essence of history is change, as some assert. But for the Western World, and particularly this country, the fact of change has had a very special reality. Every generation has had to recognize and adjust to change at an ever increasing rate and with ever widening consequences in many aspects of our existence.

These developments have not been forced upon us. Indeed, the inescapable fact is that we have invited change and that we carry a very heavy share of the responsibility for it. In government and politics, of course, we began our existence with revolution and with a new constitutional federalism. Arnold Toynbee, speaking in Williamsburg a year or two ago upon the occasion of the 185th Anniversary of the Virginia Declaration of Rights, laid at America's doorstep, at the doorstep of our own revoluion, much of the world's rising expectations, much of the revolutionary ferment which has occurred around the globe and which still engulfs our position in the family of nations.

Our business, industrial and agricultural worlds have nourished and fed research and invention. Ideas generated by an expanding scientific and technological capacity have been speedily converted to practical use. Every phase of our life seems to have been transformed by our own acts.

Perhaps more significant than change as an historical fact is that it also promises to be the overriding condition of our future existence. Typical of the many who are fortunately attempting to foresee the future, the Research Institute of America a month or two ago published its staff's assessment of the next 15 years. Its opening words were these: "Boom and opportunity, challenge and change. A third industrial revolution is in the making, as dramatic as those that followed the harnessing of steam power and the proliferation of electricity. This one will be sired by the release of nuclear and thermonuclear energy, the electronic conversion of energy to work, and the use

of cybernetics and computers to free human energy from routine decision-making.

"By 1980, the industrial world will be as different from today's as today is different from the 19th century." The report ticked off predicted developments and their impact upon the family, the elderly, our distribution and marketing systems, methods of production, materials and products.

Many other sources tell a similar story. There may be some differences in detail but none see any slackening in the rate of change or any significant alteration in the dynamics of our society which will continue to transform it from day to day. At the same time, there are few who make any attempt to gloss over the problems which impending developments will place in our lap or attempt to minimize the difficulties in their solution.

For some, the overriding issues of the immediate future are the undiminished growth in population, which in this country will reach 250 million by 1980, and the successful international management of the nuclear ability to destroy the world, a question symptomatic of the need for some order and stability in the international sphere. For others the primary worry is the current and forthcoming crisis in jobs, the difficulty in finding meaningful and remunerative work for anywhere near enough of our people as machines continue to displace men and women even at the management level. It is not only subsistence which is at issue here. It is the worry of satisfying man's urge to be useful as non-working time increases, the problem, perhaps, of giving this time an acceptable and worthwhile content.

For still others the primary concern is the task of educating more and more citizens to the level of real opportunity to survive in a world demanding higher and higher performance. Part of the job is to produce a whole spectrum of specialists competent to conduct the affairs of increasingly complex private and public worlds. It will be essential to seek talent everywhere and, wherever found, to educate it to meet tomorrow's problems. Moreover, there will be a growing realization that education in a rapidly changing world is a lifelong process. Response to this need will be institutionalized in both the private and public spheres.

Another and related issue has great significance for us all. Many fear that as machines take over the work of man, science, industry and government will become so complex that only the diminishing few can hope to understand them, to participate in their functioning or their rewards or to exercise any meaningful control over them. Vital issues may be difficult to identify and even more difficult to explain, not only to the ordinary voter but to those who are now thought to be the opinion leaders in the community. In short, it is feared that the gulf between the mass of the people and the public and private bureaucracies will continue to widen, with unfortunate implications for freedom and our political life.

These are just some samples from the problem list. I mention them only to suggest that the law and those who practice it will inevitably be involved. Law has not escaped transformation in the past and cannot hope to insulate itself from the changes to come. This, of course, is but another truism, for law to a significant extent has been a response to change and, like education, is one of the methods to accommodate change and to manage it peacefully and rationally

I have no doubt that to a greater extent than ever before the law degree and admission to the bar will be only the beginning of legal education and, hopefully, at least an introduction to the methods and techniques by which change in the law is and can be effected.

In the past, revolutionary developments in industry and economic structure have affected not only the substance and content of the law and required the adaptation of old instruments to new uses, but has also modified the structure of the profession and the methods of its practice. The law itself is a specialty; but traditional legal training and experience did not satisfy the needs of clients living in a world of rapid flux. Critical problems demanded unusual skill and wisdom. This market for experience spawned specialists in many branches of the law and the departmentalized law firm became commonplace, as did the individual practitioner confining his practice more or less to a limited field. Even in the smaller cities and towns this same process occurred. In some large firms the closest thing to the general practitioner is the so-called corporate lawyer who has responsibility for the affairs of a large client. These men are said to have no specialty because they so frequently enlist the aid of the experts to solve emerging problems. But they are in reality exercising what is perhaps the rarest talent of all—the management of skills, the over-all judgment upon legal issues which cut across a series of specialized fields.

I suspect that what has happened before will happen over and over again at an increasing pace in the next 20 years—that a client will develop needs for service which his lawyer may not have anticipated and cannot satisfy, at least on short notice; that the carefully developed specialty of the lawyer and the years of experience of the individual practitioner may become obsolescent at a frightening rate; and that valued retainers may evaporate with the client who has perished in the flood tide of change.

This lacing of the lawyer to the industrial and the commercial world, his commitment to remolding the law to serve a modern business and agricultural community, and the proliferation of the specialist—all of these were perhaps inevitable. And in this respect the immediate future promises no let up at all.

But these developments have other overtones. Change frequently exacts a charge; and from at least one standpoint, both lawyers and the public are paying a rather stiff price for efficiency and streamlined performance. That price is, perhaps, a somewhat diminished availability of the average lawyer,

and of the profession as a whole, as wise and effective counsellors upon public affairs. Admittedly there are some intensely practical considerations which militate against the average lawyer staying abreast of the major issues which the legal profession must face or which the country at large must solve. Specialization undoubtedly has been of great service to clients. But acquiring and maintaining a sufficient experience in a narrow field may be a considerable obstacle to an acquaintance with others. If the specialist is to remain firmly in command of a fluid subject matter, sheer considerations of time and energy may preclude his involvement in the affairs of other branches of the law and of the profession generally, to say nothing of public affairs or public policy. The law has always been a demanding profession and it has become more so as it places new requirements upon lawyers who serve the needs of clients. Whether specialist or not, the ordinary lawyer daily faces the question of what to do with the mass of literature and printed material which crosses his desk. Where is he to find the time and energy to continue his training which is surely necessary if he is to remain an effective counsellor? Is it physically possible for him to maintain a working familiarity with the major trends in the law, with its urgent problems and their resolution?

And what about the lawyer as a citizen? To what extent is it at all feasible for him to lend his talents to the solution of community problems in the next 20 years, by either public or private means? Political scientists may disagree upon how decisions are made or ought to be made in the United States. But few discount entirely the role of the opinion leader in the community, the press, the educators and the educated, the voluntary associations and the like. Characteristically, the lawyer has been in this group and he remains there today. But will he, can he, be there in the future?

Some may suggest, as they have, that the lawyer has sold his soul to his clients; that the lawyer, individually or as a group no longer has an independent mind of his own. I seriously doubt such shot gun indictments, but for me, at least, the alienation of the lawyer from public affairs is a real threat indeed and to the extent it comes to pass the public will lose an effective and talented resource which traditionally has played an important role.

Let me give the point some concrete substance in the area of constitutional law, where law and public policy come face to face and the domain of the lawyer and public issues overlap. Much of the subject matter in this field deals with basic goals and the democratic machinery for achieving them. Much of it, consequently, is everybody's business and the widest possible understanding and consensus are desirable. If it is fanciful to hope for so much, as it probably is, it is nevertheless undeniable that community leaders, interest group representatives and the like—indeed all those who in fact have special responsibility for transmitting social values from one generation to another—should be exposed to a fair-minded assessment of emerging constitutional issues, perhaps even be expected to have minimum acquaintance with basic principles upon which important constitutional issues will turn.

There is, for example, widespread belief in freedom of speech and certain other basic constitutional tenets. Put in this way it is difficult to stir up an argument. But an article of faith is not self-explanatory when application to concrete situations is in dispute, particularly when one article of faith competes with another or appears to.

Last term the Court decided *New York Time v. Sullivan,* a case which dealt with the extent to which the First Amendment protects libelous publications about public officials, undoubtedly a question with potential impact upon anyone who wants to talk or write about his public servants or who is interested in a responsible electorate and a responsive government. The case concerned the publication of a paid advertisement which was allegedly false and defamatory. For the purposes of general damages under state law, a defamatory statement was presumed false, presumed damaging to reputation and presumed maliciously made. The defense of truth was available, however, and the proof of actual malice was required for the recovery of punitive damages. The jury made a lump sum award of damages in the amount of $500,000 and the judgment was affirmed by the state's highest court. The Supreme Court reversed and held that the publication did not lose First Amendment protection by either its falsity or its damaging character. The First Amendment, it was held, "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." The liar spreading a known and damaging falsehood about a public official must thus respond in damages but the honest mistake is protected by the First Amendment whether the reputation of the public official is damaged or not. You will understand, I think, that this is a major development.

But may the state while providing a remedy in damages for the known malicious lie also put the peddler of falsehoods in jail as the statutes of the 50 states would appear to allow? This question was posed in *Garrison v. Louisiana,* which the Court put over for reargument and decision next term.

The Court also had several cases before it posing the issue of First Amendment protection to allegedly obscene material, a topic of intense interest to a great many people in the United States, each of whom perhaps, like Supreme Court Justices, has his own distinctive point of view. There remains much to be decided on this subject, much to be understood by the courts, by the citizen and by his elected representatives in local law making bodies.

In still another First Amendment case the Court held that the First and Fourteenth Amendments gave a union the constitutional right to advise its members to seek counsel and to recommend specific lawyers for them to employ, a right which a state could not extinguish. This case provoked the opposition of many bar associations around the country.

I would hope that cases like this are noticed by more than the public official and the mass media and that some reliable mechanisms are available to acquaint all others who ought to know.

I suggest neither a propaganda campaign nor support for any doctrine or decision. But awareness and fair-minded discussion are desirable, both with the long range hopes and aspirations of the community in mind.

Let me touch upon a few other items. In the *Malloy* case the Court applied the federal rule against compulsory incrimination to the states. And according to the *Murphy* case, if a state is to compel incriminating testimony in exchange for immunity, the evidence compelled is unusable by the federal authorities. In *Aguilar* the Court reaffirmed a previous holding that mere affirmation of belief by an official or an informer unaccompanied by supporting facts will not satisfy the requirement of probable cause or the issuance of a warrant to search a private dwelling. In *Escobedo* the question of the right to counsel during police interrogation was considered.

Thus the reach and application of the First, Fourth, Fifth and Sixth Amendments were before the Court for decision last term. When does the citizen have a protected right to speak or not to speak, to the assistance of counsel, to the privacy of his home?

Again, I would hope for some reliable, institutionalized procedures for disseminating basic information and fair-minded assessments of these pervasive developments. Unquestionably, the press and the law schools, if not other parts of the academic world, regularly react to these matters. But the primary interest of the press is in present and current news and it may not be equipped to do the task without significant help. And while the dialogue between town and gown is admirable in many university cities, in others it is not. My question is, what about the lawyer? While some of the issues in constitutional litigation deal with values on which there are, perhaps, no experts at all, and while the interest of the political scientist, editor, the business man, the labor union and all policy oriented citizens is understandable and wholly legitimate, constitutional developments arise primarily in the context of law suits brought and conducted by lawyers on behalf of their clients. Whatever else this is, this is the realm of the lawyer and it is to him that the community first turns when constitutional issues are being debated. It is he, if anyone, who is responsible for understanding and expounding our Constitution, its history and fundamental principles. It is he who is responsible, if anyone, for the state of public education in constitutional matters. Perhaps in every community there are one or more lawyers who in fact stay abreast of the kind of questions about which we have been talking. But who is he and what does he do about it? I suspect that it is the rare lawyer who does anything but scan the constitutional opinions of the state and federal courts. Having come from private practice not too long ago, I also have the feeling that a healthy proportion of the lawyers do not read them at all until and unless they become relevant to some item which appears on his

charge sheets. There are many recognized specialists in the law but the specialist in constitutional law is not commonplace in private practice. I am unwilling to think that meaningful writing and discussion of these issues should be the monopoly of the law schools and their output confined to scholarly journals which, like our opinions, have a public, but a relatively small one.

It became fashionable for many people in my generation, lawyers and non-lawyers alike, to scorn participation in public affairs. There was much advice to the effect that public and private bureaucracies are entirely too dangerous to individuality to risk participation. Accordingly, withdrawal to a purely personal sphere was essential to avoid surrender to false values and to maintain integrity and personality. I sense, however, that the younger are more willing to contest and slay the dragon, are more interested in making this system work than discarding it for a new one. I hope so, particularly in the case of the young lawyer. A good many of you younger men were born during a decided slump in the birth rate. There are fewer of you around than you think. Your task from now through middle age will be unusually formidable. But your opportunity will be very large. I leave you with them both.